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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION

Rapporteur: Mr. Francisco Villagran Kramer

CHAPTER IV

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

CONTENTS

		Paragraphs	Page
A.	Introduction	1 - 7	
B.	Consideration of the topic at the present session . .	8 - 40	
1.	Draft articles adopted by the Drafting Committee at the forty-seventh session of the Commission .	8	
2.	The eleventh report of the Special Rapporteur submitted at the present session	9 - 20	
3.	Preliminary comments by some members of the Commission on the tenth and eleventh reports . .	21 - 40	

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CONTENTS (continued)

		Paragraphs	Page
C.	Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law		
	1. Text of the draft articles provisionally adopted by the Commission so far on first reading Addendum		
	2. Text of draft articles A[6], B[7], C[8 and 9] and D[9 and 10] with commentaries thereto adopted by the Commission at its forty-seventh session Addendum		

CHAPTER IV

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

1. The Commission, at its thirtieth session (1978), included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur. 1/

2. The Commission, from its thirty-second (1980) to its thirty-sixth session (1984), received and considered five reports from the Special Rapporteur. 2/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

3. The Commission, at its thirty-sixth session (1984), also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline 3/ and a study prepared by the

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1/ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group see Yearbook ... 1978, vol. II, (Part Two), pp. 150-152.

2/ For the five reports of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2; Yearbook ... 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; Yearbook ... 1982, vol. II (Part One), p. 51, document A/CN.4/360; Yearbook ... 1983, vol. II (Part One), p. 201, document A/CN.4/373; Yearbook ... 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

3/ Yearbook ... 1984, vol. II (Part One), p. 129, document A/CN.4/378.

secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". 4/

4. The Commission, at its thirty-seventh session (1985), appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received eight reports from the Special Rapporteur from its thirty-seventh (1985) to its forty-fourth session (1992). 5/ At its fortieth session (1988), the Commission referred to the Drafting Committee draft articles 1 to 10 proposed by the Special Rapporteur for Chapter I (General Provisions) and Chapter II (Principles). 6/ At its forty-first session (1989), the Commission also referred to the Drafting Committee the revised version of those articles which had already been referred to the Drafting Committee at the previous session. 7/

5. At its forty-fourth session (1992), the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic. 8/ On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992, took the following decisions:

4/ Yearbook ... 1985, vol. II (Part One) Addendum, document A/CN.4/384.

5/ For the seven reports of the Special Rapporteur, see Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394; Yearbook ... 1986, vol. II (Part One), p. 145, document A/CN.4/402; Yearbook ... 1987, vol. II (Part One), p. 47, document A/CN.4/405; Yearbook ... 1988, vol. II (Part One), p. 251, document A/CN.4/413; Yearbook ... 1989, vol. II (Part One), p. 131, document A/CN.4/423; document A/CN.4/428 and Corr.1 and 4 (all languages), Corr.2 (English only), and Corr.3 (Spanish only) and Add.1; document A/CN.4/437 and Corr.1 and document A/CN.4/443 and Corr.1 and Corr.2 (Spanish only).

6/ For the text see Yearbook ... 1988, vol. II (Part Two), p. 9.

7/ See Yearbook ... 1989, vol. II (Part Two), para. 311. Further changes on some of those articles were again proposed by the Special Rapporteur in his Sixth Report, see (Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10) (A/45/10), para. 471.

8/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10), p. 127-129.

"(a) Scope of the topic

(i) The Commission noted that, in the last several years of its work on this topic, it has identified the broad area and the outer limits of the topic but has not yet made a final decision on its precise scope. In the view of the Commission, such a decision at this time might be premature. The Commission, however, agreed that, in order to facilitate progress on the subject, it would be prudent to approach its consideration within that broad area in stages and to establish priorities for issues to be covered.

(ii) Within the understanding set forth in paragraph (i) above, the Commission decided that the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should be considered first; only after having completed its work on that first part of the topic would the Commission proceed to the question of remedial measures. Remedial measures in this context may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.

(iii) Attention should be focused at this stage on drafting articles in respect of activities having a risk of causing transboundary harm and the Commission should not deal, at this stage, with other activities which in fact cause harm. In view of the recommendation contained in paragraph (ii) above, the articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of causing transboundary harm, it will then decide on the next stage of the work."

"(b) The approach to be taken with regard to the nature of the article or of the instrument to be drafted

(iv) In the view of the Commission it would be premature to decide at this stage on the nature of either the articles to be drafted or the eventual form of the instrument that will emerge from its work on this topic. It would be prudent to defer such a decision, in accordance with the usual practice of the Commission, until the completion of the work on the topic. The Commission will examine and adopt the articles proposed for this topic, in accordance with its usual practice, on the basis of

the merits of the articles, their clarity and utility for the contemporary and future needs of the international community and their possible contribution to the promotion of the progressive development of international law and its codification in this area."

"(c) Title of the topic

(v) In view of the ambiguity in the title of the topic as to whether it includes 'activities' or 'acts', the Commission decided to continue with its working hypothesis that the topic deal with 'activities' and to defer any formal change of the title, since in the light of the future work on the topic additional changes in the title may be necessary. The Commission will therefore wait until it is prepared to make a final recommendation on the changes in the title."

"(d) Recommendation on the report of the Special Rapporteur for the next year

(vi) The Commission took note with thanks and appreciation of the previous reports of the Special Rapporteur in which the issues of prevention were examined in respect of both activities having a risk of causing and those causing transboundary harm. It requested that the Special Rapporteur, in his next report to the Commission, should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised set of draft articles to that effect." 9/

6. At its forty-fifth session (1993), the Commission considered the ninth report of the Special Rapporteur (A/CN.4/450) devoted to the issue of prevention and referred draft article 10 (non-discrimination), which the Commission had examined at its forty-second session (1990), and articles 11 to 20 bis to the Drafting Committee.

7. At its forty-sixth session (1994), the Commission had before it the tenth report of the Special Rapporteur (A/CN.4/459) addressing three issues: prevention ex post, State liability and civil liability. 10/ The Commission decided to defer consideration of the report and instead concentrate work on the articles of this topic already before the Drafting

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9/ Ibid.

10/ A summary of the tenth report is contained in Official Records of the General Assembly, Forty-ninth Session, Supplement No.10 (A/49/10), paras. 362-379.

Committee. At the same session, the Commission provisionally adopted on first reading the following draft articles with commentaries thereto: 1 (scope of the present articles); 2 (use of terms); 11 (prior authorization); 12 (risk assessment), 13 (pre-existing activities); 14 (measures to prevent or minimize the risk), 14 bis [20 bis] (non-transference of risk); 15 (notification and information); 16 (exchange of information); 16 bis (information to the public); 17 (national security and industrial secrets); 18 (consultations on preventive measures); 19 (rights of the State likely to be affected); and 20 (factors involved in an equitable balance of interests).

B. Consideration of the topic at the present session

1. Draft articles adopted by the Drafting Committee at the forty-seventh session of the Commission

8. At its ... meeting held on ... July 1995, the Commission considered and provisionally adopted the following articles which had been referred to the Drafting Committee at its fortieth and forty-first sessions in 1988 and 1989: article A[6] (freedom of action and the limits thereto); article B[7] (cooperation); article C[8 and 9] (prevention); and article D[9 and 10] (liability and compensation). The text of those articles and the commentaries thereto are reproduced in Section C.2 below.

2. The eleventh report of the Special Rapporteur submitted at the present session

9. At the present session, the Commission had before it the Special Rapporteur's eleventh report (A/CN.4/468) which was introduced at the Commission's 2397th meeting, held on 13 June 1995. The Commission decided to consider the report, together with the tenth report (A/CN.4/459) submitted in 1994, at its next session. The Commission, however, allocated a few meetings during which members of the Commission who wished to make preliminary observations on the two reports be able to do so. At the 2397th to 2399th meetings held on 8, 9 and 13 June 1995, some members of the Commission expressed preliminary views on both reports; a summary of those views is contained in section 3 below.

10. The Commission also had before it a study prepared by the Secretariat pursuant to a request by the General Assembly contained in paragraph 5 of its resolution 49/51 of 9 December 1994. The study is entitled "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law" (A/CN.4/471).

11. The eleventh report dealt with the role of harm in the articles of this topic. The report characterized it as the condition sine qua non of any liability and compensation which may be due. The focus of the report, however, was on harm to the environment. Other forms of harm, namely harm to persons and property, had already been discussed in previous reports, including the eighth report (A/CN.4/443, paras. 41-51). The question of harm to the environment had not been sufficiently developed.

12. The report referred to the increasing recognition of the importance of the environment in terms of its economic value, its health value as well as its non-material value to our civilization. The recognition is evidenced not only by the very large number of treaties, designed in general to prevent harm to the environment, but also by inclusion of harm to the environment within the general definition of harm. 11/ Furthermore, the concept of harm to the environment has been incorporated into the domestic laws of a number of States including Norway, Finland, Sweden, Germany, Brazil and the United States. The Special Rapporteur, therefore, proposed to incorporate in the definition of harm, harm to the environment.

13. In order to define harm to the environment, one needs a definition of the environment itself. Indeed, the definition of environment will determine the scope of harm to the environment. At the present, however, there is no universally accepted concept of environment; elements considered to be part of the environment in the definition of environment in some conventions are not found in others. A restricted concept of environment limits harm to the environment exclusively to resources such as air, soil, water, fauna and flora and their interactions. A broader concept covers landscape and what are

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11/ See, for example, article 2 (7) (d) of the 1993 Convention on civil liability for damage resulting from activities dangerous to the environment; article 1 (c) of the Convention on the transboundary effects of industrial accidents; article 1 (20) of the Convention on the Protection and use of transboundary watercourses and international lakes; article 8 (2) (a), (b) and (d) of the Convention on the regulation of Antarctic mineral resource activities; and article 9 (c) and (d) of the Convention on civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels. See also the directives proposed by the ECE Task Force on Responsibility and Liability regarding Transboundary Water Pollution and the draft protocol on liability to the Basel Convention (UN/CHW.2/3) and Security Council resolution 687 (1991) where it states that "Iraq ... is liable under international law for any direct loss, damage - including environmental damage and the depletion of natural resources - ... as a result of its unlawful invasion and occupation of Kuwait".

called "environmental values" of usefulness or pleasure produced by the environment. Thus one speaks of "service values" and "non-service values"; the former would, for example, include a fish stock that would permit a service such as commercial or recreational fishing, while the latter would include the aesthetic aspects of the landscape, to which the population attaches value and the loss of which can cause them displeasure, annoyance or distress. The broad definition also includes property forming part of the cultural heritage.

14. In the view of the Special Rapporteur, any definition of the environment should exclude those parts that are already included in the traditional definition of harm and enjoy protection under international law, e.g. anything that causes physical harm to persons or their health, whether directly or as a result of environmental damage. This approach has been taken by the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. The Special Rapporteur expressed uncertainty as to the inclusion of "the cultural environment" in the definition of the environment. While admitting its importance, he felt that it should not be included in the definition of the environment for the purposes of compensation because these types of property are already protected by the general concept of harm.

15. Similarly, the Special Rapporteur felt that "landscapes" should not be included as "elements" or "components" in the definition of environment. They should be considered "values" of the environment which are treasured by the population. This loss should therefore be compensated.

16. With respect to reparation of harm to the environment, the report raised two questions: first who shall be deemed to be the injured party and second what does such harm consist of? In the view of the Special Rapporteur, since environment <u>per se</u> is not susceptible to private ownership, but belongs to the community as a whole, the State whose environment has been damaged should be the party entitled to reparation. States may grant in their rights in this regard to government agencies or <u>non-governmental welfare organizations</u>. Reference in this context was made to the same domestic legislation in the United States where government agencies and Indian tribes are enabled by statute to act as trustees in matters relating to certain environmental damage.

17. As regards reparation to the environment, the Special Rapporteur made a distinction between the requirement of reparation in the draft articles on State responsibility and that in this topic. The rules of reparation in the former were to be in conformity with the principle enunciated by the decision in the Chorzow Factory case, namely reparation should wipe out the consequences of the wrongful act and re-establish the situation which would, in all probability, have existed had that act not been committed. In his view, the rules of reparation in this topic did not follow the Chorzow dictum, since this topic involved activities which were not prohibited by international law. None the less, the Chorzow dictum also provided guidance in this field because of its reasonableness and the fairness it embodied.

18. Many existing civil liability conventions seem to have ignored certain forms of reparation such as naturalis restitutio, focusing, instead, on monetary compensation. However, as regards damage to the environment, the most common form of reparation provided for in the existing conventions seems to be almost the same as naturalis restitutio, e.g. restoration of the damaged elements of the environment. Members of an endangered or destroyed species can be reintroduced into an ecosystem where enough members of the species exist elsewhere. Equivalent compensation, on the other hand, would primarily be directed, in the case of total destruction of a certain component, to the introduction of an equivalent component; only if that were not possible, would monetary compensation be required. The existing civil liability conventions also include in the concept of damage, the costs of preventive measures and any damage or loss caused by these measures. The Special Rapporteur found this approach to be reasonable and appropriate also for the present topic.

19. The Special Rapporteur explained that, in his view, the most appropriate remedy for harm to the environment was the restoration of the environment. The remedy was more desirable in view of the difficulties in making any assessment of harm to the environment per se. Nevertheless, there are situations in which partial or total restoration of the environment is impossible and monetary compensation has to be assessed. He noted that a number of models may be adopted for that purpose. One is to assess the costs of restoration, the other includes the market value that the environmental

damage has rendered inassessible, hedonic pricing, 12/ or contingent valuation methodology, 13/ etc.

20. In the light of the above explanations, the Special Rapporteur proposed a text for the definition of harm. 14/

12/ Hedonic pricing methods take the market value added to the value of private ownership with designated environmental amenities and seek to transpose such values to public resources with comparable amenities.

13/ This method has been developed to measure the value by asking people how much they would be willing to pay, for example through a tax increase, to protect a natural resource from harm. This method has been criticized, it may be noted, for it does not reflect real economic behaviour and cannot therefore be relied upon.

14/ The proposed text reads as follows:

"'Harm' means:

(a) Loss of life, personal injury or impairment of the health or physical integrity of persons;

(b) Damage to property or loss of profit;

(c) Harm to the environment, including:

(i) The cost of reasonable measures taken or to be taken to restore or replace destroyed or damaged natural resources or, where reasonable, to introduce the equivalent of these resources into the environment;

(ii) The cost of preventive measures and of any further damage caused by such measures;

(iii) The compensation that may be granted by the court in accordance with the principles of equity and justice if the measures indicated in subparagraph (i) were impossible, unreasonable or insufficient to achieve a situation acceptably close to the status quo ante. Such compensation should be used to improve the environment of the affected region:

- the environment includes ecosystems and natural, biotic and abiotic resources, such as air, water, soil, fauna and flora and the interaction among these factors.

- the affected State or the bodies which it designated under its domestic law shall have the right of action for reparation of environmental damage.

3. Preliminary comments by some members of the Commission on the tenth and eleventh reports

21. A few members of the Commission expressed preliminary views on the tenth and eleventh reports of the Special Rapporteur (A/CN.4/459 and A/CN.4/468). They found the reports well researched, presenting an approach which reflected a judicious combination of codification and progressive development of international law in the area.

22. As regards the tenth report, setting forth a regime of liability, it was noted that the Special Rapporteur had examined the questions of civil liability together with the responsibility of the State. This approach was generally supported, particularly the fact that the draft articles identified circumstances in which States may have subsidiary or residual liability. In this context, it was noted that the Special Rapporteur had rightly distinguished four major areas: first, the role of the operator; secondly, the role of risk capital; thirdly, the international mechanism for risk insurance and financing; and fourthly, the liability of the operator.

23. It was also noted that the articles rightly dealt with both issues of substantive law of liability and questions of procedure. The Special Rapporteur's view that the issue of civil liability must also be examined in connection with the responsibility of the State was generally supported. It was also observed that there were other common issues between the two topics such as grounds for exoneration from liability and enforcement of judgements.

24. In terms of structure, it was suggested that the draft articles could be divided into two separate chapters, one concerning the rule of liability per se and the other concerning procedure. With regard to the latter, it was observed that, in general, many States prescribed that the competent court was the court at the place where the harm occurred. However, support was expressed for the proposal by the Special Rapporteur of not confining the competence of the court to the State where the harm occurred, alone, but allowing some leeway to seek options, including the court of the affected State.

25. As regards the issue of prevention ex post, the comment was made that the Special Rapporteur's original proposal of including prevention of ex post in the chapter on prevention and not on reparation was prudent and reasonable. It was noted that the concept of "response measures", as discussed by the Special Rapporteur, was now found in several agreements, and his proposal represented progressive development of law on that subject. In that

connection, the comment was made that placing heavier and wider obligations of prevention on States and operators engaging in activities that entailed a risk of causing transboundary harm would certainly have the effect of reducing the likelihood of such harm occurring.

26. It was further noted that a clear concept of harm was essential in any serious discussion on a regime of liability. It was also stated that the Commission must consider the implications of imposing liability for wrongful acts when a State failed to fulfil its obligations of prevention, in relation to the articles on State responsibility.

27. The eleventh report of the Special Rapporteur was welcomed. It was noted that the Commission's work must reflect the recent international trend, which was rapidly gaining pace, towards preserving the natural world.

28. Overall the view of the Special Rapporteur on the evaluation and restoration of damaged natural resources was endorsed. The comment was made that in the proposed definition for harm, in the paragraph concerning remedial action for harm to the environment, the Special Rapporteur recognized the right of action by the State or by the bodies which it designated under its domestic laws. It was stated that this issue, while important, went beyond the ordinary meaning of the definition and could perhaps be placed in another part, on regulation of the conduct of the State or operator.

29. It was noted that the Special Rapporteur had referred to "non-governmental welfare organizations" in paragraph 22 of the report and, in paragraph 36, to "the competence of certain public authorities" as "the bodies" designated by the State. However, it was not clear why the bodies designated by the State were entitled to have recourse to the right of action. The question was raised as to whether individuals had locus standi to make a claim for harm to the environment where a State or the institution designated by the State refused to bring a claim.

30. As to the definition of the "environment" concern was expressed about the wisdom of excluding the human factor. It was stated that beginning with the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), the human factor had been present in a great many instruments. As an example, article 1, paragraph 4, of the United Nations Convention on the Law of the Sea was cited.

31. In that connection, it was further stated that paragraphs 6, 8, 9 and 16 of the report of the Special Rapporteur appeared to suggest that, since human

life was protected by law in a number of domains, it should not be covered by instruments on the environment. According to this view, when work had first begun on an instrument for environmental protection several decades ago, the title used had been "protection of the human environment". Human beings had thus been placed at the very centre of the issue from the outset. It therefore seemed questionable that human beings should now be entirely excluded from consideration in an instrument on liability for environmental damage.

32. It was stated that the definition of harm must be reasonably comprehensive without being overburdened with detail. In a preliminary stage, it ought to cover the following elements: loss of life, personal injury or other impairment of health, loss of or damage to property within the affected State, as well as impairment of the natural resources and human or cultural environment of that affected State.

33. It was pointed out that the basis of obligation to compensate for transboundary harm not prohibited by international law was of the utmost importance to the topic. In this regard it was observed that, where the obligation to compensate was set out clearly in a treaty, there should be no legal difficulty in determining the basis for the obligation. Difficulties arose however, where there was no such treaty. In such cases, it was difficult to determine which law was applicable. It was felt that, taking into account the humanitarian consideration, it should not be impossible to find a basis for an obligation to compensate, at least in cases of very hazardous activities. This was a field in which, in many national systems of law, the obligation to compensate no longer entailed that the injured party had to prove that there had been a failure to take all precautions at source to prevent the harm from taking place. It was noted that there was a view that in many cases the solution might be a claim for compensation at the level of private international law, but doubt was expressed as to whether that was possible if the States concerned were both geographically distant and had different national legal systems. Logistical difficulties were also mentioned as factors against litigation abroad.

34. Consequently, it was felt that there was a need to consider elaborating rules applicable between States under public international law, without prohibiting individual claimants from instituting proceedings under private international law if they so desired.

35. The view was expressed that the Commission should focus its attention on the definition of the word "harm" and avoid spending time on other questions that could be considered at a later stage, notably: the necessity that the harm for which a particular claim for compensation was made should not be remote, but a reasonably direct consequence of the activity in the State of origin; and the standards to be utilized in determining the amount of compensation payable in particular cases; and who would be entitled to submit claims. Reference was made to the prospects of catastrophic harm which might require a different approach to compensation. However, the Commission, it was noted, should, at least in principle, adhere to the fundamental idea that the primary purpose of compensation was to restore the situation to what it was prior to the harm.

36. The comment was further made that the first three sentences of paragraph 18 of the report seemed to blur the distinction between "harm" and "damage", nor was the distinction made very clear in the proposed definition of harm contained in paragraph 38; the words "harm" and "damage" were used interchangeably. It was admitted that was the case in no less authoritative an instrument than the United Nations Convention on the Law of the Sea. There the words "harm" and "harmful" were used only in article 1, paragraph 4, and article 206. Everywhere else in that instrument the term "damage" was used. It was felt that the concept of harm should be clearly defined since it was essential to any serious discussion on a regime of liability.

37. Reference was made to paragraph 24 of the report stating that the Chorzow rule of restitutio in integrum was strictly applicable to breaches of what were called primary rules and that it "is not being as rigorously respected in this field as in that of wrongful acts". It was felt that the Chorzow rule must also serve as an indicator of the degree to which reparation must be made for damage to the environment. Thus, subject to treaty obligations, reparation should seek as far as possible to restore the status quo ante.

38. It was noted that the topic presented particularly difficult issues for developing States. Since developing States did not have the technology to carry out such acts and were more likely to be affected by them, they would generally favour a regime of strict controls, but as engaging in those acts was imperative for development, they must perhaps agree to a somewhat less strict regime. Likewise in favour of a strict regime of controls were developing States located near other States (whether slightly developed,

almost developed or fully developed), in which activities of that nature took place and which felt directly threatened by those acts, as well as island States whose economies were primarily dependent on tourism and for whom the integrity of the natural environment was of the utmost importance.

39. The comment was further made that developed States might favour a liberal regime since they generally engaged in such activities. But it must be borne in mind that some of those States were less developed than others and therefore engaged in such activities to a lesser degree and might therefore prefer a stricter regime. It was thus noted that the dichotomy established between developed and developing States for the purposes of discussing this subject was at best only relevant as a generalization. Otherwise it might be misleading. Ultimately, it was stated that the Commission must find a solution on the basis of State practice, an examination of relevant international conventions and proposals which developed international law.

40. With respect to the definition of harm proposed by the Special Rapporteur the suggestion was made to introduce subparagraphs (i), (ii) and (iii) with a phrase such as: "in assessing reparation for harm to the environment, due account may be taken of". In order to stress the relevance of the Chorzow rule in the field, it was proposed to make even more explicit the text of paragraph (c) (i) by inserting the words the "status quo ante" after "restore". It was felt that the phrase "where reasonable" in subparagraph (i) did not sufficiently capture the circumstances in which the equivalent of resources not restored or replaced might be introduced into the environment. Subparagraph (iii) was found insufficiently stringent, and it was proposed to replace it with the following wording: "the reasonable compensation in cases where the measures indicated in paragraph (c) (i) were impossible or insufficient to achieve a situation acceptably close to the status quo ante".

C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law

1. Text of the draft articles provisionally adopted by the Commission so far on first reading

Addendum

2. Text of draft articles A[6], B[7], C [8 and 9] and D[9 and 10] with commentaries thereto adopted by the Commission at its forty-seventh session

Addendum

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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION

Rapporteur: Mr. Francisco Villagran Kramer

CHAPTER III

STATE RESPONSIBILITY

CONTENTS

		Paragraphs	Page
A.	Introduction	1 - 6	
B.	Consideration of the topic at the present session	7 - 108	
1.	Presentation by the Special Rapporteur of his seventh report	8 - 15	
2.	Consideration by the Commission of the Special Rapporteur's seventh report	16 - 91	
(a)	General observations	17 - 21	
(b)	The concept of "State crime" as contained in article 19 of Part One of the draft articles	22 - 38	
(1)	The distinction between "crimes" and "delicts"	22 - 24	

CONTENTS (continued)

		Paragraphs	Page
(2)	The legal and political basis of the concept of crimes	25 - 26	
(3)	Terminological and other aspects of article 19 of Part One of the draft articles	27 - 28	
(4)	The concept of "State crime" in the light of the maxim "Societas delinquere non potest"	29 - 32	
(5)	Relevance of the concept of fault in the present context	33 - 35	
(6)	The question of the implementation of the concept of criminal responsibility of the State	36	
(7)	Possible alternatives to the concept of State crime	37 - 38	
(c)	The consequences of internationally wrongful acts characterized as crimes in article 19 of Part One of the draft articles	39 - 89	
(1)	The relationship between the legal regime of the consequences of crimes and other existing or prospective legal regimes	39 - 41	
(2)	The concept of "injured State" for the purpose of the determination of the legal consequences of acts characterized as crimes in article 19 of Part One of the draft	42 - 50	
(3)	The draft articles proposed by the Special Rapporteur for inclusion in Part Two of the draft	51 - 88	
(i)	Draft article 15	51	
(ii)	Draft article 16	52 - 65	
(iii)	Draft article 17	66 - 69	
(iv)	Draft article 18	70 - 72	
(v)	Draft article 19	73 - 88	

CONTENTS (continued)

	Paragraphs	Page
a. General observations on the institutional scheme proposed by the Special Rapporteur	73 - 74	
b. The role assigned to the General Assembly, the Security Council and the International Court of Justice under the proposed scheme . .	75 - 80	
The roles of the General Assembly and the Security Council	75 - 76	
The role of the International Court of Justice	77 - 80	
c. Alternative approaches	81 - 86	
d. Other comments on article 19	87 - 88	
(4) The draft article proposed by the Special Rapporteur for inclusion in Part Three of the draft	89	
(d) The courses of action open to the Commission .	90 - 91	
3. Summing up of the debate by the Special Rapporteur .	92 - 105	
4. Action by the Commission under the topic	106 - 108	

A. Introduction

1. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation (mise en oeuvre) of international responsibility. 1/

2. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". 2/

3. The Commission, at its thirty-second session, also began the consideration of Part Two of the draft articles, on "the content, forms and degrees of international responsibility".

4. The Commission, from its thirty-second (1980) to its thirty-eighth sessions (1986), received seven reports from the previous Special Rapporteur, Mr. William Riphagen, 3/ with reference to Parts Two and Three of the draft articles. From that time on, the Commission assumed that a Part Three on the settlement of disputes and the implementation (mise en oeuvre) of international responsibility would be included in the draft articles.

1/ Yearbook ... 1975, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

2/ Yearbook ... 1980, vol. II (Part Two), pp. 26-63, document A/35/10, chap. III.

3/ For the seven reports of the Special Rapporteur, see
Yearbook ... 1980, vol. II (Part One), p. 107, document A/CN.4/330;
Yearbook ... 1981, vol. II (Part One), p. 79, document A/CN.4/334;
Yearbook ... 1982, vol. II (Part One), p. 22, document A/CN.4/354;
Yearbook ... 1983, vol. II (Part One), p. 3, document A/CN.4/366; and Add.1;
Yearbook ... 1984, vol. II (Part One), p. 1, document A/CN.4/380;
Yearbook ... 1985, vol. II (Part One), p. 3, document A/CN.4/389; and
Yearbook ... 1986, vol. II (Part One), p. 1, document A/CN.4/397; and Add.1.

5. The Commission, from its fortieth (1988) to its forty-sixth (1994) sessions, received six reports 4/ from the current Special Rapporteur, 5/ Mr. Gaetano Arangio-Ruiz.

6. At the conclusion of its forty-sixth session, the Commission had provisionally adopted for inclusion in Part Two of the draft articles 1 to 5 6/ and articles 6 (Cessation of wrongful conduct), 6 bis (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction), 10 bis (Guarantees of non-repetition), 7/ 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures). 8/ It had furthermore received from the Drafting Committee a text for article 12 (Conditions relating to resort to countermeasures), on which it deferred action. 9/ Finally, it had referred to the Drafting Committee draft article 5 bis (proposed by the current Special Rapporteur for inclusion in Part Two) 10/ and draft articles 1 to 6 of Part Three (and an Annex

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4/ For the six reports of the Special Rapporteur, see Yearbook ... 1986, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1; Yearbook ... 1990, vol. II (Part One), document A/CN.4/425 and Add.1; Yearbook ... 1991, vol. II (Part One), document A/CN.4/440 and Add.1; document A/CN.444 and Add.1-3; document A/CN.4/453 and Add.1 and Corr.1, 2 and 3 and Add.2 and 3; and document A/CN.4/461 and Add.1 and 2.

5/ The current Special Rapporteur was appointed at the thirty ninth session in 1987.

6/ For the text of articles 1 to 5 (para. 1), with commentaries, see Yearbook ... 1985, vol. II (Part Two), pp. 24 et seq.

7/ For the text of article 5, paragraph 2 and articles 6, 6 bis, 7, 8, 10 and 10 bis, with commentaries, see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), pp. 132 et seq.

8/ For the text of articles 11, 13 and 14, see ibid., Forty-ninth Session, Supplement No. 10 (A/49/10), footnote 362. Article 11 was adopted by the Commission on the understanding that it might have to be reviewed in the light of the text that would eventually be adopted for article 12 (see ibid., para. 352).

9/ See ibid., para. 352.

10/ For the text of draft article 5 bis as proposed by the Special Rapporteur, see footnote 35 below.

thereto) concerning dispute settlement procedures, 11/ also proposed by the current Special Rapporteur and to be considered by the Drafting Committee together with the proposals of the previous Special Rapporteur on the same subject. 12/

B. Consideration of the topic at the present session

7. At the present session, the Commission had before it the seventh report of the Special Rapporteur (A/CN.4/469 and Corr.1 and Add.1 and 2). The report dealt, on the one hand, with the question of the legal consequences of internationally wrongful acts characterized as crimes under article 19 of Part One of the draft articles and, on the other hand, with the settlement of disputes relating to the legal consequences of an international crime. The first question was addressed in six new draft articles to be included in Part Two as articles 15 to 20 13/ and the second in a new draft article 7 to be included in Part Three of the draft. 14/

1. Presentation by the Special Rapporteur of his seventh report

8. In his introduction, the Special Rapporteur stated that the seventh report dealt, on the one hand, with the special or supplementary consequences to be attached to internationally wrongful acts characterized as crimes in article 19 of Part One of the draft (the normative aspect) and, on the other, with the machinery for the implementation of such consequences (the institutional aspect); both aspects called for a relatively high degree of progressive development. So far as the normative aspect was concerned, the report differentiated between substantive consequences (cessation and reparation) and instrumental consequences, each of those categories being divided into two subcategories, namely, special consequences (that is,

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11/ For the text of draft articles 1 to 6 of Part Three and the Annex thereto submitted by the current Special Rapporteur, see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), pp. 102 et seq., footnotes 74, 75, 76, 77, 78 and 79.

12/ For the text of draft articles 1 to 5 of Part Three and the Annex thereto as submitted by the previous Special Rapporteur, see Yearbook ... 1986, vol. II (Part Two), p. 35, footnote 86.

13/ For the text of these articles, see footnotes 15, 16, 18, 20 to 24 below.

14/ For the text of this article see footnote 50 below.

aggravated forms of the consequences provided for in article 6 to 14 for delicts) and supplementary consequences (that is, new consequences additional to the first). 15/

9. So far as substantive consequences are concerned, it seemed that the obligations set forth in articles 6 (Cessation of wrongful conduct), 6 bis (Reparation) and 8 (Compensation) were incumbent on the perpetrator of a crime as well as on the perpetrator of a delict, the only difference being that, in the case of a crime, all States were injured States, whereas, in the case of a delict, that was only true if the obligation breached was an erga omnes obligation. In the case of restitution in kind, on the other hand, the erga omnes relationship resulting from the commission of a crime divested of any meaning the parallel drawn by article 7 (c), in the case of delicts, between the situation of the wrongdoing State and that of the injured States. What was needed was to require the wrongdoing State to restore as fully as possible a situation the preservation of which was in the "essential interest" of the international community, even if a heavy burden was thus placed on the wrongdoing State, the only limits being those deriving from the preservation of the existence of the State in question, the vital needs of its people and, in principle, its territorial integrity. Article 7 should be adapted to the case of crimes in one other respect, namely, the mitigation of the restitution in kind obligation which was intended to safeguard the wrongdoing State's political independence and economic stability (para. (d)). According to the Special Rapporteur, it was not equitable to invoke the "economic stability" factor in the case of crimes, particularly if the crime enriched its perpetrator, the only limit to be imposed being that relating to the preservation of the vital needs of the people. So far as "political independence" was concerned, the Special Rapporteur considered that a distinction should be drawn between the existence of a State as a distinct sovereign entity - which would have to be preserved - and the freedom of organization of the State - which, perhaps, should not be sacrosanct, as, for

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15/ This approach is reflected in proposed article 15 reading as follows:

"Without prejudice [in addition] to the legal consequences entailed by an international delict under articles 6 to 14 of the present Part, an international crime as defined in article 19 of Part One entails the special or supplementary consequences set forth in articles 16 to 19 below."

instance, in the case of a despotic regime which was responsible for serious breaches of essential international obligations. Accordingly, the Special Rapporteur considered that the mitigations of the obligation of restitution contained in article 7 (c) and (d) should not be applicable in the case of a crime unless full compliance with that obligation would put in jeopardy either the existence of the wrongdoing State (and, perhaps, its territorial integrity) or the vital needs of its population. He also regarded as unsuited to the case of crimes the clause in article 10, paragraph 3, which ruled out any form of satisfaction that would "impair the dignity" of the wrongdoing State - a restriction that would be no more justified in the case of guarantees of non-repetition (art. 10 bis): a wrongdoing State responsible for a crime could not escape its obligations by invoking respect for a dignity it had itself offended. After all, in the case of crimes, demands for satisfaction and guarantees of non-repetition might affect not only the wrongdoing State's "dignity", but also its sovereignty, independence, domestic jurisdiction and liberty. It should therefore be made clear that a wrongdoing State could not benefit from mitigations deriving from principles or rules of international law relating to the protection of its sovereignty, domestic jurisdiction and freedom, the only limit being, once again, that which pertained to the safeguarding of its existence, the vital needs of its people and, in principle, its territorial integrity. 16/

16/ The approach reflected in paragraph 9 above found expression in proposed article 16 reading as follows:

> "1. Where an internationally wrongful act of a State is an international crime, every State is entitled, subject to the condition set forth in paragraph 5 of article 19 below, to demand that the State which is committing or has committed the crime should cease its wrongful conduct and provide full reparation in conformity with articles 6 to 10 bis, as modified by paragraphs 2 and 3 below.
>
> 2. The right of every injured State to obtain restitution in kind as provided in article 7 shall not be subject to the limitations set forth in subparagraphs (c) and (d) of paragraph 1 of the said article, except where restitution in kind would jeopardize the existence of the wrongdoing State as an independent member of the international community, its territorial integrity or the vital needs of its people.
>
> 3. Subject to the preservation of its existence as an independent member of the international community and to the safeguarding of its territorial integrity and the vital needs of its people, a State which has committed an international crime is not entitled to benefit from any

10. The instrumental consequences of crimes were obviously aggravated, as compared to the consequences of delicts, by the fact that all States were entitled to resort to countermeasures against the wrongdoing State. On that point, the Special Rapporteur proposed that provisions based on articles 11 17/ and 12, but duly adapted to the special nature of crimes, should be included in the draft. The adjustments in question related to the elimination of the twofold requirement of prior notice 18/ and prior resort to available means for the settlement of disputes. The elimination of the latter requirement made it unnecessary to include a clause on the possibility of resort to "urgent, temporary measures as required to protect the rights of the injured State or limit the damage caused by an internationally wrongful act". 19/ Such a clause would regain its full raison d'être in the case of crimes if, as the Special Rapporteur proposed (see para. 14 below), the lawfulness of the reaction to a crime by the injured States as a whole was made subject to the condition of a prior decision by an international body. In that context, the object of interim measures would, for example, be to

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limitations of its obligation to provide satisfaction and guarantees of non-repetition as envisaged in articles 10 and 10 bis, relating to the respect of its dignity, or from any rules or principles of international law relating to the protection of its sovereignty and liberty."

17/ See report of the International Law Commission on the work of its forty-sixth session (Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10), (A/49/10), footnote 362.

18/ In the case of crimes, prior notice was, in the view of the Special Rapporteur, unnecessary if, as he proposed, the adoption of countermeasures against the State which perpetrated a crime had to be preceded by public debates and also dangerous to the extent that a notice addressed to the wrongdoing State could jeopardize the effectiveness of the countermeasures.

19/ See article 12 (a) as originally proposed by the Special Rapporteur in his fourth report (Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10), (A/47/10), footnote 44.

secure immediate access to the victims for purposes of rescue or to prevent the continuation of a genocide, despatch humanitarian convoys, combat pollution, etc. 20/

11. As to the principle of proportionality, the Special Rapporteur proposed that the reference to "the effects ... on the injured State", which appeared in article 13, 21/ should be deleted from the corresponding provision concerning crimes, first, because that element of comparison gave undue weight to what was only one of the criteria for assessing the gravity of the act (a criticism that applied equally to delicts) and, secondly, because the effects of a crime - and indeed of a delict if the obligation breached was an erga omnes obligation - affected the community of States in varying degrees. 22/

12. It seemed that the prohibitions set forth in article 14 (a) and (b) 23/ could apply without change to crimes, provided it was made clear that the prohibitions on the threat or use of force and on extreme economic or political measures did not apply either to the exercise of the right of self-defence or to measures decided on by the Security Council under

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20/ The approach reflected in paragraph 10 above found expression in proposed paragraphs 1 and 2 of article 17 reading as follows:

> "1. Where the internally wrongful act of a State is an international crime, every State whose demands under article 16 have not met with an adequate response from the State which has committed or is committing the crime is entitled, subject to the condition set forth in paragraph 5 of article 19 below, to resort to countermeasures under the conditions and restrictions set forth in articles 11, 13 and 14 as modified by paragraphs 2 and 3 of the present article.
>
> 2. The condition set forth in paragraph 5 of article 19 below does not apply to such urgent, interim measures as are required to protect the rights of an injured State or to limit the damage caused by the international crime."

21/ See footnote 17 above.

22/ This approach is reflected in proposed paragraph 3 of article 17 reading as follows:

> "3. The requirement of proportionality set forth in article 13 shall apply to countermeasures taken by any State so that such measures shall not be out of proportion to the gravity of the international crime."

23/ See footnote 17 above.

Chapter VII of the Charter. 24/ The prohibitions set forth in article 14 (c), (d) and (e) were equally applicable because of the importance of the "protected objects".

13. The supplementary consequences included a number of obligations which were incumbent on injured States 25/ and the obligation on the

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24/ See in this connection proposed article 20 reading as follows:

"The provisions of the articles of the present Part are without prejudice to:

(i) any measures decided upon by the Security Council of the United Nations in the exercise of its functions under the provisions of the Charter;

(ii) the inherent right of self-defence as provided in Article 51 of the Charter."

25/ Listed in paragraph 1 of proposed article 18 reading as follows:

"1. Where an internationally wrongful act is an international crime, all States shall, subject to the condition set forth in paragraph 5 of article 19 below:

(a) refrain from recognizing as legal or valid, under international or national law, the situation created by the international crime;

(b) abstain from any act or omission which may assist the wrongdoing State in maintaining the said situation;

(c) assist each other in carrying out their obligations under subparagraphs (a) and (b) and, in so far as possible, coordinate their respective reactions through available international bodies or ad hoc arrangements;

(d) refrain from hindering in any way, by act or omission, the exercise of the rights or powers provided for in articles 16 and 17;

(e) fully implement the aut dedere aut iudicare principle, with respect to any individuals accused of crimes against the peace and security of mankind the commission of which has brought about the international crime of the State or contributed thereto;

(f) take part, jointly or individually, in any lawful measures decided or recommended by any international organization of which they are members against the State which has committed or is committing the international crime;

wrongdoing State to accept fact-finding operations or observer missions on its territory. 26/

14. With regard to the institutional aspect, the seventh report identified the theoretically conceivable degrees of institutional involvement and described, from a more realistic point of view, a number of instances of organized reactions by the General Assembly and the Security Council to grave breaches of international obligations, while at the same time recognizing that those two organs were purely political organs and that their reactions had not been intended as specific reactions to breaches of the kind contemplated in article 19 of Part One. Since it did not seem realistic to entrust to international bodies all of the decisions and actions necessary for the implementation of the legal consequences of crimes, the seventh report advocated another approach whereby such bodies would be required to take a decision only as to the existence and attribution of an international crime. The possibility could be envisaged of entrusting that role to the International Court of Justice, which had the threefold advantage of possessing the necessary technical capacity, being reasonably representative and handing down its judgements with the reasons therefor in fact and law. But such a solution would be dangerous without an international institution like a department of public prosecution able to debar unsubstantiated allegations and also in view of the probable tendency of States, once the International Court of Justice had been vested with the necessary compulsory jurisdiction, to submit to the Court any issue of responsibility, even those involving a mere delict. The General Assembly, on its side, had the advantage of being representative and having broad competence ratione materiae, but the drawback was that it could not make a binding legal determination in the area of State responsibility. As for the Security Council, although it could, of

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(g) facilitate, by all possible means, the adoption and implementation of any lawful measures intended to remedy any emergency situations caused by an international crime."

26/ This approach is reflected in proposed paragraph 2 of article 18 reading as follows:

"Subject to the conditions set forth in paragraph 5 of article 19 below, the State which has committed or is committing an international crime shall not oppose fact-finding operations or observer missions in its territory for the verification of compliance with its obligations of cessation or reparation."

course, take binding decisions in the area of international peace and security, it was not empowered to deal with the other areas referred to in article 19, paragraph 3, and it was not representative or technically capable of dealing with the legal issues of State responsibility. Furthermore, the Security Council, like the General Assembly, was of an essentially political character and it did not seem to be in keeping with a sound conception of justice to entrust any of those bodies with an exclusive role in assessing issues of responsibility. The seventh report therefore proposed that the three organs should combine in taking any decision concerning the existence or attribution of a crime, each bringing into play the role that matched its own characteristics. 27/ The procedure in the Court should, in the view of the

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27/ This approach is reflected in proposed paragraphs 1, 2, 3 and 5 of article 19. The article reads as follows:

> "1. Any State Member of the United Nations Party to the present Convention claiming that an international crime has been or is being committed by one or more States shall bring the matter to the attention of the General Assembly or the Security Council of the United Nations in accordance with Chapter VI of the United Nations Charter.
>
> 2. If the General Assembly or the Security Council resolves by a qualified majority of the Members present and voting that the allegation is sufficiently substantiated to justify the grave concern of the international community, any Member State of the United Nations Party to the present Convention, including the State against which the claim is made, may bring the matter to the International Court of Justice by unilateral application for the Court to decide by a judgment whether the alleged international crime has been or is being committed by the accused State.
>
> 3. The qualified majority referred to in the preceding paragraph shall be, in the General Assembly, a two-thirds majority of the Members present and voting, and in the Security Council, nine Members present and voting including permanent Members, provided that any Members directly concerned shall abstain from voting.
>
> 4. In any case where the International Court of Justice is exercising its competence in a dispute between two or more Member States of the United Nations Parties to the present Convention, on the basis of a title of jurisdiction other than paragraph 2 of the present article, with regard to the existence of an international crime of State, any other Member State of the United Nations which is a party to the present Convention shall be entitled to join, by unilateral application, the proceedings of the Court for the purpose of paragraph 5 of the present article.

Special Rapporteur, involve a judgement rather than an advisory opinion, for the reasons set out in the report. As to the regime applicable when a case was brought before the Court not on the basis of the jurisdictional link created by the future convention on State responsibility, but of conventions such as the Genocide Convention providing for the jurisdiction of the Court on the basis of a unilateral application, the Special Rapporteur referred to the text that he was proposing for paragraph 4 of article 19 of Part Two. 28/

15. Summing up the characteristics of internationally wrongful acts classed as crimes in article 19 of Part One of the draft, the Special Rapporteur emphasized that, as shown by the examples in the seventh report, such acts (i) infringed erga omnes rules, possibly jus cogens rules; (ii) injured all States; (iii) justified a generalized demand for cessation/reparation; and (iv) possibly justified a generalized reaction by States or international bodies. The concept of a generalized reaction, underlying article 19 of Part One and ushered in by article 5 of Part Two (which entitled all States to demand cessation/reparation and resort to countermeasures), was viable only if the future convention made such a reaction subject to measures of control - and that was precisely the purpose of articles 15 to 20 (reproduced in footnotes 15, 16, 20, 22 and 24 to 27 above). The Special Rapporteur also drew attention to the fact that the two-phase procedure provided for in article 19 (see footnote 27 above) did not involve any modification of the Charter or the Statute of the Court and in no way affected the political role assigned by the Charter to the Security Council - and, to a lesser degree, to the General Assembly - in the maintenance of international peace and security, a field in which the decision would finally lie with the Security Council alone, but in the field of State responsibility, including cases of very serious violations of fundamental international obligations, the action of the injured States would be subordinate to a prior decision by the Court. As to the Security Council and the General Assembly, for which paragraph 3 of

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5. A decision of the International Court of Justice that an international crime has been or is being committed shall fulfil the condition for the implementation, by any Member State of the United Nations Party to the present Convention, of the special or supplementary legal consequences of international crimes of States as contemplated in articles 16, 17 and 18 of the present Part."

28/ See footnote 27 above.

article 19 (see footnote 27 above) sought to ensure impartiality as far as was possible, the role assigned to them by paragraph 2 of the same article (ibid.) fell under Chapter VI. The Special Rapporteur emphasized in this connection that the Council's powers in the maintenance of international peace and security, as well as the right to self-defence provided for in Article 51 of the Charter, were duly preserved in article 20 (see footnote 24 above).

2. Consideration by the Commission of the Special Rapporteur's seventh report

16. The Commission considered the Special Rapporteur's seventh report at its 2391st to 2398th meetings. A summary of the discussion is to be found below.

(a) General observations

17. Appreciation was expressed to the Special Rapporteur for his seventh report, which was described as a most positive and valuable contribution to the law of State responsibility, as a model of legal argument, as a brilliant contribution to the doctrine on the topic and as a forward-looking document which was bound to stimulate a productive and enriching debate. The Special Rapporteur was praised for his sincerity and intellectual honesty, for the courage he was displaying in placing the strengthening of the rule of law in international relations before the cold, calculating and selfish realism of the individual interests of States and for his keen sensitivity to the real politics of the present-day world.

18. Some members, while globally endorsing the general orientation of the seventh report, which they viewed as responsive to the wishes of the Commission, queried some of its aspects. Many of the report's features, it was stated, were very attractive, but a number of them were distinctly problematical. The remark was also made that the Special Rapporteur had relied almost exclusively on European doctrine.

19. Other members, while paying tribute to the Special Rapporteur's commendable intellectual efforts faithfully to abide by the past decisions of the Commission, queried the wisdom of those decisions and, by way of consequence, of the proposals contained in the seventh report. Those proposals were described as too broad to be realistic and as revolutionary and unattuned to States' sense of international law. Concern was expressed that the Special Rapporteur's scheme, despite its ingeniousness and boldness, could

not be put into practice and that the Commission's work might lead nowhere in that it could not affect the competence of United Nations organs as defined by the Charter.

20. A number of members insisted on the complexity of the topic in general and of the issues raised by the seventh report in particular. The remark was made in this connection that, just as there had been reluctance to accept State responsibility as compatible with sovereignty, now there was equal reluctance to accept the concept of crimes of States in international law and that Governments were slow to accept more effective international law - in particular more effective majority for its implementation. Attention was drawn to the difficulties involved in devising a legal system of State responsibility which was broadly compatible with the global legal or institutional balance secured under the United Nations Charter system and which preserved the international political and legal status quo, while introducing a legitimate dose of adaptability and innovation, so as to reconcile the desirable with the possible.

21. The issues involved, it was stated, posed methodological, technical and political difficulties. With regard to methodology, the Commission had, by departing from the order followed in article 19 of Part One, made its task more difficult, for it would have been simpler to adapt to delicts the regime that was applicable for crimes, rather than follow the opposite approach. With regard to technique, the Commission had, by making the law on State responsibility multilateral, in keeping with the law on treaties and Part One of the draft, altered the fundamental bases of machinery which, in essence, remained bipolar and thus opened the door to many problems. The third kind of difficulty was that State crimes were internationally wrongful acts of an essentially political nature and it was very difficult to strike a proper balance between law and politics.

(b) The concept of "State crime" as contained in article 19 of Part One of the draft articles

(1) The distinction between "crimes" and "delicts"

22. Some members contested the possibility of drawing a clear distinction between two categories of wrongful acts - "crimes" and "delicts" - in terms of their gravity. In their opinion, there was a continuum ranging from minor breaches to very serious breaches affecting the international community as a

whole. Concern was expressed that the criterion of gravity necessarily implied entering the field of primary obligations in a set of rules intended to set out secondary obligations.

23. Other members considered that crimes were easily distinguishable from delicts in that they threatened the very foundations of the international community and called for a particular reaction: a breach of an international tariff clause could not, it was said, be placed on the same level as genocide or occupation of territory by another State. In the view of some of those members, a second criterion lay in the idea of fault and of criminal intent implicit in the concept of a crime. This criterion was rejected by several members for various reasons, as indicated in paragraph 34 below.

24. There was also a view that, although the distinction between delicts and crimes helped delineate the legal consequences of each category and struck a happy compromise between those who advocated a number of differentiated regimes - which would lead to fragmentation - and those who wished to encompass many breaches within a single legal regime, widespread delicts could, like crimes, threaten the very fabric of international society and elicit moral indignation.

(2) The legal and political basis of the concept of crimes

25. Some members pointed out that particularly serious violations of international obligations such as genocide or aggression had become generally recognized as "crimes" when they were committed not only by individuals, but also by States. Such was, it was stated, the prevailing opinion of doctrine and the same conclusion could be inferred from the decision of the International Court of Justice in the Barcelona Traction 29/ case.

26. Other members observed that the Nürnberg and Tokyo Tribunals had tried and punished individuals, that the international tribunals recently established by the Security Council did not have jurisdiction to try State crimes and that the draft Code and the draft statute for an international criminal court were also intended solely for individuals. Accordingly, it was concluded that the proposal to impute crimes to States did not reflect modern State practice.

29/ I.C.J. Reports, 1970, p. 32.

(3) Terminological and other aspects of article 19 of Part One of the draft articles

27. Some members endorsed the use of the word "crime" in article 19 of Part One of the draft, pointing out that this word had long been current in legal parlance and that its use would not gravely offend States. Among those members, some stressed that the term in question was merely intended to designate a particularly serious violation of international law and involved no criminal connotation whatsoever. For others, it was precisely because of its negative and condemnatory connotation and because it brought into the legal domain a moral and political element that the word "crime" was entirely appropriate to the acts concerned. In any event, it was remarked, the word "delict" was also borrowed from the vocabulary of criminal law: the unfortunate impression was thus created that the Commission had an entirely punitive notion of international responsibility, but the terminology in question had become so commonplace that it would be counter-productive to modify it.

28. According to another view, the use of the word "crime" in article 19 was incorrect and confusing because, in many legal systems, the concept of crime marked the great divide between two entire areas of national law, i.e. a legal system intended to compensate for harm caused and a legal system intended to punish and characterized by unique features (great precision of substantial law, rigid procedures and special courts and systems of enforcement). Concern was expressed that the problem was not one of terminology, but stemmed from the fact that the present purpose of the draft remained not to compensate, but to punish.

(4) The concept of "State crime" in the light of the maxim "Societas delinquere non potest"

29. Several members considered that it was widely accepted that States did not commit crimes. One of them pointed out that two of the three constituent elements of a State - namely, territory and population - obviously could not be imputed with responsibility for a crime and that, on the third element - organs of government - States had differing views. In any case, the State itself was exempted from criminal responsibility, for it alone was entitled to punish and could not punish itself. The remark was also made that the State could become a tool in the hands of individuals with criminal motives and it was those individuals, not the tool they used, who should be held criminally

responsible. In response to the argument that private companies could be found guilty of crimes under domestic law, the point was made that the analogy between private companies and States was extremely tenuous.

30. Other members stressed that the concept of criminal responsibility of legal persons was accepted in various legal systems and that the Nürnberg Tribunal had recognized a number of legal persons as criminals. Mention was made of the Guiding Principles for Crime Prevention and Criminal Justice adopted by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders which invited Member States to give due consideration to making criminally responsible not only those persons who had acted on behalf of an institution or corporation, but also the institution or corporation itself. The view was further expressed that States had a persona and a personality and that there was nothing unusual in the notion that States had the capacity to commit crimes.

31. The criminalization of States was also criticized by some members on account of its consequences. Concern was expressed that it might result in the punishment of an entire people - which would be particularly unfair where the State itself was the prime victim of the crime (as, for instance, in a case of genocide). The remark was also made that, to use the legal fiction of "attribution" to make a State liable to compensate for damage caused by its officials was one thing, while casting the shadow of crime over the entire population of a State was quite another matter and one not sustainable either in fact or in reason. The Commission was urged not to encourage a trend to characterize certain States as "rogue" States, thereby offering powerful States a pretext to resort abusively to countermeasures or to interim measures - in other words, to self-help - either directly or in the guise of assistance to the alleged victim State.

32. Other members felt that it was preferable to designate a specific conduct of States as criminal and to regulate the consequences through judicial review and the introduction of substantive rules to spare the population of the criminal State extreme hardship rather than to leave that whole area of international regulations unregulated, concealing the punitive element under the guise of restitution or guarantees against repetition. It was said in this connection that some States had been subjected to penal consequences, sometimes exceeding those usually attached to crimes, without their actions being designated as crimes.

(5) Relevance of the concept of fault in the present context

33. According to some members, where crimes existed, fault could not be far behind. The view was expressed in this connection that while, in the case of delicts, the responsibility of States was neither civil nor criminal, but international in nature, and set in motion by a factual occurrence - a breach of law, the concept of fault was perfectly relevant in the case of crimes and was one of the elements that distinguished a crime from a mere delict for it entailed an element of intent and deliberation.

34. Other members, as indicated in paragraph 23 above, disagreed with this view on the ground that wrongful intent was also present in a delict, albeit perhaps to a lesser extent. In their view, the distinction between crimes and delicts had to be drawn on the basis of the seriousness of the consequences and the extent of the material, legal and moral injury caused to another or other States and to the international community, whether organized or not.

35. Still other members expressed concern that the concept of fault would introduce a system of punishment into inter-State relations. They accordingly invited the Commission to stick by the basic decision taken many years ago when it had adopted article 3 (b), i.e. that the basis of the obligation to compensate in the whole field of State responsibility must rest exclusively on a State's breach of an international obligation, and to proceed on the premise that the purpose of the draft articles was to compensate for harm caused, the solution to breaches of great magnitude being then to ensure that the draft allowed for the imposition of compensation of equal magnitude.

(6) The question of the implementation of the concept of criminal responsibility of the State

36. Some members took the view that international society was not currently structured to deal with "crimes". Others called on the Commission to explore, in a constructive spirit, the possibility offered by the present organization of international society. The views expressed in this connection are reflected in more detail in paras. 73 to 86 below.

(7) Possible alternatives to the concept of State crime

37. Some members felt that there was no need to resort to the controversial concept of "State crime" to respond to the preoccupations underlying article 19. It was stated that, if the first objective was deterrence, the best way of achieving it was to attribute criminal responsibility to the individuals from the offending State who had decided to commit the wrongful act. The remark was made in this connection that, by recognizing the

possibility of the criminal responsibility of State leaders, the Commission had surely taken a step far more threatening to potential criminals in positions of power than the recognition of the criminal responsibility of States. The question was further raised whether it was possible to identify acts likely to be recognized by States as crimes or as extremely serious violations of erga omnes obligations that did not constitute a threat to peace and security or a breach of the peace and, as such, fell within the competence of the Security Council: if the answer was in the negative, the concept of State crime served no useful purpose and it was preferable to rely on the existing machinery which was beginning to work.

38. Other members took the view that neither the acknowledgement of the existence of individual criminal responsibility nor the fact that the Commission had, in its work on the draft Code of Crimes against the Peace and Security of Mankind, adopted the approach of dealing with individual criminal responsibility detracted from the validity of the concept of State responsibility for crimes. It was also pointed out that the material differentiation of wrongdoing was a creation and an achievement of the International Law Commission, which should endeavour to deal with it by means of a normative projection that would take account of the specific nature of State crimes. The concept of State crime, it was stated, was embodied in article 19 of Part One, which had been adopted unopposed and it was hardly admissible continually to go back on past decisions.

(c) The consequences of internationally wrongful acts characterized as crimes in article 19 of Part One of the draft articles

(1) The relationship between the legal regime of the consequences of "crimes" and other existing or prospective legal regimes

39. Emphasis was placed on the distinction to be made between State responsibility for crimes and individual criminal responsibility under the future Code of Crimes against the Peace and Security of Mankind. The remark was made in this connection that (1) the range of crimes under the draft Code and the range of conduct that could be characterized as crimes under the draft on State responsibility did not coincide; (2) that the international responsibility of States from the standpoint of the draft under consideration did not result from the criminal responsibility that might be incurred by individuals under the Code; and (3) that the international responsibility of States arising from acts or omissions characterized as international crimes did not require the crimes in question to be identified and precisely defined.

It was none the less pointed out that all crimes against the peace and security of mankind were crimes under international law and entailed the criminal responsibility of the perpetrators and that there were certain consequences for the draft on State responsibility. 30/ In order to draw a clear line between crimes under the Code and crimes under the future convention on State responsibility, it was suggested that the present draft should include a saving clause concerning any question that might arise as a result of responsibility incurred in the case of the commission of a crime against the peace and security of mankind.

40. Some members also wondered about the relationship between the draft under consideration and the Charter system for the maintenance of international peace and security. The following questions were raised in this connection. If, in the context of a "crime", a countermeasure was taken by a State against another State, would that constitute a threat to peace which could trigger an intervention by the Security Council? If only few States became parties to the possible future convention on the topic, would not the system that would be put in place itself represent a potential threat to international peace and security? If such a system were established, would it not be necessary to make it very clear that amendments to the Charter would have to be made or at least considered? Lastly, given the fact that the Charter contained not only institutional arrangements relating to the Security Council and the General Assembly, but also fundamental principles of contemporary international law (domestic jurisdiction, territorial integrity, political independence), would an amendment of those provisions also become necessary?

41. It was also asked whether, given the imperative constitutional role of the Security Council in connection with the maintenance of international peace and security, there was anything left for the Commission to consider in connection with the topic under consideration 31/ and whether there was any State conduct properly to be considered, given the tendency of the

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30/ Reference was made in this connection to paragraph 2 (d) of article 10 on satisfaction (see footnote 7 above). In the case of crimes, it was stated, punishment was a necessity and the punishment could be inflicted not only by the State in question, but also internationally.

31/ It was also remarked in this connection that, while not all international crimes necessarily endangered international peace and security, those which spontaneously came to mind did so.

Security Council to be rather liberal in characterizing acts as constituting a threat to the peace. In reply, attention was drawn, in connection with the first point, to the many international instruments which had taken the precaution of preserving the competence of the Council - and there was nothing to prevent such a course being taken. As to the second point, it was recognized that the effect of subordinating the future convention to the provisions of the Charter on the maintenance of international peace and security, expressly recognized in article 4 of Part Two, 32/ combined with the still embryonic tendency of the Security Council and the General Assembly to broaden the notion of a threat to the peace, was to restrict the scope of the law on responsibility for a crime. It was none the less observed that the Commission could usefully study fields in which there was controversy about the limits of the Council's competence.

(2) The concept of "injured State" for the purpose of the determination of the legal consequences of acts characterized as crimes in article 19 of Part One of the draft

42. Several members noted that, from the fact that a crime was a breach of an erga omnes obligation and from paragraph 3 of article 5 of Part Two, 33/ the Special Rapporteur had logically drawn the conclusion that, in the case of crimes, all States were "injured States". In their view, however, this did not mean that all States had the same entitlements in terms of the substantive and instrumental consequences of a crime and article 5 needed to be revised

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32/ Reading as follows:

> "The legal consequences of an internationally wrongful act of a State set out in the provisions of the present Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security."

For the commentary to the article, see Yearbook ... 1983, vol. II (Part Two), p. 46.

See also draft article 20 proposed by the Special Rapporteur and reproduced in footnote 24 above.

33/ Reading as follows:

> "3. In addition, 'injured State' means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States."

accordingly. In this connection, it was recalled that, in the commentary to article 5, the Commission had clearly recognized that the legal consequences of an international crime required further elaboration and distinctions and that article 5, paragraph 3, did not prejudice the extent of the legal consequences which were attached to the commission of an international crime, a matter to be dealt with in the framework of Part Two of the draft. 34/

43. A number of members expressed agreement with the Special Rapporteur's position that, in view of the gravity of crimes and the severity of the special or supplementary consequences they entailed, very serious difficulties might arise from a universalization of the status of injured State. In this connection, it was stressed that such a universalization would take the form, as far as substantive consequences are concerned, of an unacceptable multiplicity of claims and enable all States, under the regime of State responsibility, to take the same type of action as could be taken by the Security Council in the discharge of its collective security responsibilities, with the consequential risk of conflict between States and the Council.

44. Other members warned against overestimating the risks involved in a broad interpretation of the concept of "injured State" in the context of crimes. It was stressed, on the one hand, that the draft articles ruled out any use of armed force, which was governed by the relevant provisions of the Charter, and, on the other, that the competence of the Security Council with regard to the maintenance of peace and the evolving interpretation of the concept of "threat to peace" had the effect of transferring power to respond to quite a few of the most serious violations of international law to the international community. In this context, attention was drawn to article 4 of Part Two (see footnote 32 above).

45. According to a third view, the option to resort to countermeasures was open to all States in case of a breach of any erga omnes obligation: that, it was stated, confirmed that the concept of crimes served no useful purpose.

46. Attention was also drawn to another difficulty that might arise as a result of the universalization of the status of injured State if the regime for the consequences of crimes was to be embodied in a treaty. The remark was made in this connection that, if one started from the premise that, when an international crime was committed, all States were injured States, any State,

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34/ Yearbook ... 1985, vol. II (Part Two), p. 27, para. (28).

even one not bound by the future convention, could resort to countermeasures, the result being that the treaty would function for the entire community of nations, not just the States Parties. Furthermore, since the treaty would confer upon the Assembly the power to take certain decisions by a two-thirds majority, such decisions might quite conceivably be made by non-party States. In the light of the above, it was suggested to have the part of the draft on crimes adopted as a separate instrument by the Assembly, it being understood that all Member States would subsequently be bound by it.

47. As for the possibility of differentiating between various categories of injured States, the Special Rapporteur was of the view that, if there were marked differences in certain cases (aggression, marine pollution of coastal waters, et similia), the same was not true in the case, for instance, of impairment of the global commons. In his opinion, the basic premise should be that, in the case of a crime, all States were legally injured, as clearly flowed from the concept of erga omnes obligations recognized by the International Court of Justice in the Barcelona Traction case. He agreed that the draft article 5 bis he had proposed in 1992 35/ offered only a partial reply to the question of the extent to which States were on an equal footing in terms of the right to claim cessation or reparation and to resort to countermeasures. He suggested the possible approach of recognizing that, while all injured States were equally entitled to demand cessation/reparation and eventually to take countermeasures, they were not necessarily entitled to demand for themselves or to take measures for their own material benefit, but they were entitled to act for the benefit of each injured State in so far as it was injured. In this context, he also drew attention to paragraphs (c), (f), and (g) of his draft article 18 (see footnote 25 above).

48. A number of members felt that the Special Rapporteur's essential postulate - that all States were injured by an international crime - was unfounded and that a clear differentiation between States directly injured and those acting as defensores legis was called for. The need to differentiate between directly and indirectly injured States was viewed as relevant both to the substantive and to the instrumental consequences of crimes.

35/ Reading as follows:

> "Whenever there is more than one injured State, each one of them is entitled to exercise its legal rights under the rules set forth in the following articles."

49. As regards substantive consequences, the view was expressed that, while all States injured by a crime should be entitled to demand that the author State desist from its unlawful course of action, those States which had not suffered material damage should not be entitled to obtain reparation to the same extent or in the same form as those which had. The remark was made in this context that to allow 185 individual States to make specific demands for far-reaching guarantees of non-repetition would lead to a chaotic situation and that a decision by an appropriate organ of the international community was required.

50. As to the instrumental consequences of crimes, some members considered it appropriate to authorize all States, in the conditions provided for in article 17, to resort to countermeasures because the effect of acting as a deterrent and exerting pressure would thus be considerably increased. Disagreement was, however, expressed with the view that the implementation of such consequences should remain in the hands of States: the reaction to grave violations of international law was already, in the words of one member, a joint reaction by States and the United Nations and should continue to be so.

(3) The draft articles proposed by the Special Rapporteur for inclusion in Part Two of the draft

(i) Draft article 15 36/

51. Most of the members who commented on draft article 15 generally agreed with the Special Rapporteur that, since a crime as defined in article 19 of Part One was a particularly serious breach of an international obligation essential for the protection of fundamental interests of the international community, it was quite normal and logical that it should entail all the consequences of delicts in addition to supplementary and aggravated consequences. The bracketed alternative "In addition" was therefore considered as preferable to the phrase "Without prejudice".

(ii) Draft article 16 37/

52. Several members noted that the Special Rapporteur had analyzed the substantive consequences of an international crime by going through the substantive consequences of a delict, namely, cessation, restitution,

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36/ See footnote 15 above.

37/ See footnote 16 above.

compensation, satisfaction and guarantees of non-repetition, and making the necessary adjustments - reflecting aggravated responsibility - in the texts already adopted on first reading for delicts.

53. The conclusions of the Special Rapporteur and his proposed modifications met with a wide measure of support. They also gave rise to reservations, however. The Commission was invited to bear in mind that the purpose of draft articles was not to punish, but to compensate for damage caused and to remember, in dealing with matters of fundamental importance to the relations between States in respect of which there was no clear guidance in treaties, general practice accepted as law or authoritative judicial or arbitral decisions, that there were fundamental principles of modern international law concerning the status, independence and integrity of all States set out in Article 2 of the Charter which must remain the legal parameters for the Commission's work. It was therefore considered essential to exclude any unduly excessive provision that would encroach on the rules and principles of international law relating to the protection of the sovereignty, independence and stability of the offending State.

54. There was also a view that, while the Special Rapporteur's proposed adjustments would not be inappropriate if it was decided to have a category of "crimes", they did not justify the existence of such a category and that a creative reading of paragraph 2 (c) of article 10 on satisfaction 38/ (bearing in mind that article 13 39/ on proportionality would operate as a limitation), a loosening of the constraint imposed by paragraph 3 of article 10 through the inclusion therein of the phrase "subject to the gravity or breadth of the effects of the wrongful act" and the idea of exemplary damages had greater potential than the quantum leap proposed.

55. On cessation, the few members who commented on the text proposed by the Special Rapporteur agreed with him that there was no reason to change article 6 or make it more stringent. 40/ One of them, however, suggested

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38/ See footnote 7 above.

39/ See footnote 17 above.

40/ See footnote 7 above.

that, in the case of a crime, the injured State should be able to request urgent action or support by the appropriate international institution, whether global or regional.

56. As regards restitution in kind, doubts were expressed as to its relevance in the context of crimes: the demand addressed to South Africa for an end to racial discrimination, cited as an example by the Special Rapporteur, was viewed as a demand for future action, not for restitution. The concept of restitution in full was furthermore queried in the light of the sad experience of the Versailles settlement, which, it was stated, had become one of the causes of the Second World War. It was suggested that it should be stipulated that restitution in kind should be materially feasible and morally tolerable.

57. The proposed waiver of the mitigating factors provided for, in the case of delicts, by article 7, was extensively discussed. Comments focused on the preservation of the independence of the State, of the vital needs of its population and of its territorial integrity.

58. As regards the first point, it was considered reasonable and logical that the consequences of a crime should not jeopardize the existence of the wrongdoing State. The opinion was, however, expressed that, in fact, the question did not arise because it was difficult to see how restitution in kind, i.e. the re-establishment of the pre-existing situation, might deprive a State of its status as an independent member of the international community or, for that matter, of part of its territory. On the other hand, the views expressed by the Special Rapporteur on the issue of political independence as opposed to political regime gave rise to reservations. The statement that "aggression was a wrongful act frequently perpetrated by dictators or otherwise despotic governments" was contested on the grounds that aggression was often committed by industrialized democracies whose power guaranteed them impunity. Concern was also expressed that, in the absence of a regime of international responsibility that had been worked out carefully enough, the distinction between political independence and freedom of organization would encourage highly subjective assessments. The distinction between political independence and freedom of organization also gave rise to reservations on the grounds that any restriction on freedom to choose a political regime necessarily jeopardized political independence. It was suggested that emphasis should be placed less on the regime than on the leaders.

59. The limitations regarding the vital needs of the population did not give rise to objections. Reference was made in this context to the Security Council resolutions on Iraq, under which Iraq was required to pay only 30 per cent of its oil revenues to the International Compensation Fund. Some members nevertheless questioned whether it was possible to impose serious economic consequences on the wrongdoing State without endangering the vital interests of its population. In practice, it was stressed, the population, particularly in developing countries, was much more likely to be more painfully affected by the consequences of the crime than the individuals or groups of individuals who were in power and that was an added reason for aggravating the penalties laid down in the future Draft Code of Crimes against the Peace and Security of Mankind. It was therefore considered essential to explain the meaning and scope of the expression "vital needs of the population" so that restitution in kind did not result in a massive violation of the fundamental political, social and economic rights of the population - which was what article 14 on prohibited countermeasures was designed to prevent. 41/

60. On the preservation of territorial integrity, the doubts expressed by the Special Rapporteur were shared by several members. It was asked whether, in the case where a State committed genocide against part of its population claiming the exercise of the right to self-determination and the international community took action against that State, the exercise of the right of self-determination should be entirely ruled out for the victim population. In referring to that case, some members warned against the temptation of attaching more importance to the principle of territorial integrity than to other equally basic principles. Others considered that it was not for the Commission to ask that kind of question: it was pointed out in this connection, first, that it would be inconceivable for a judicial body to sever part of a State's territory and, secondly, that such a severance could be decided only by the Security Council and, perhaps, the General Assembly for the purpose of maintaining international peace and security and that the Commission must not be concerned with the exercise by United Nations bodies of their constitutional powers.

41/ See footnote 7 above.

61. It was also noted with regard to restitution in kind that paragraph 2 of article 16 failed to draw a distinction between directly and indirectly injured States. To cure this shortcoming, it was suggested to include in that paragraph the words "where appropriate" after the word "obtain".

62. As regards compensation, several members disagreed with the Special Rapporteur's view that article 8 did not call for any adaptation. Thus, the remark was made that, after major disasters like the Second World War, it was generally impossible for full compensation to be paid for all of the harm done and that the relevant articles should be drafted accordingly. According to another trend, the question of "punitive" or aggravated damages deserved to be closely studied in the case of crimes. It was recalled in this context that punitive damages had been granted in the "I'm alone" case 42/ and claimed in a number of other, more numerous, cases. 43/

63. The Special Rapporteur's approach was furthermore criticized on the ground that it did not differentiate between the directly injured State and other injured States. It was considered highly debatable that the latter, which, by definition, had sustained only "juridical damage", should be entitled to receive a sum of money as compensation.

64. With regard to satisfaction and guarantees of non-repetition, the Special Rapporteur's explanations and proposals were viewed by several members as logical and legitimate in letter and spirit. Reservations were, however, expressed on the waiver of the limitation relating to the dignity of the wrongdoing State. The remark was made that the dignity of a wrongdoing State could only be impaired by prosecution before an international criminal court - a very remote possibility in present-day international society - and that any action short of such prosecution was likely to impair the dignity of innocent people and not of the guilty parties. Doubts were also voiced on the provision whereby a State which had committed an international crime was not entitled to benefit from any rules or principles of international law relating to the protection of its sovereignty and liberty. This provision, it was stated, would irreversibly undermine the reservation set forth in draft

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42/ Reports of International Arbitral Awards, vol. III, p. 1611.

43/ See, for example, the pleadings of the United States in the Case concerning the Aerial Incident of 3 July 1988 and the pleadings of Nicaragua in the last phase of the Case concerning Military and Paramilitary Activities in and against Nicaragua.

paragraph 3 of article 16, on the preservation of the existence of the State as an independent member of the international community and it was better to ensure that the persons responsible were punished and removed from power. In this context, emphasis was placed on the need to establish coordination, in connection with measures to be applied to the persons responsible, between the draft Code of Crimes against the Peace and Security of Mankind and the draft on State responsibility. A third criticism was that the Special Rapporteur's suggestions could not be dealt with in the context of a bilateral relationship between States of the sort to which his suggested rules were essentially confined.

65. Other comments on article 16 included the remark that there did not seem to be any reason to make the presentation of a demand for cessation conditional upon a prior determination by the International Court of Justice under paragraph 5 of article 19.

(iii) Draft article 17

66. Few members chose to comment on this article, one of the reasons mentioned being that the Commission had not yet adopted all the articles on the instrumental consequences of delicts.

67. Several members recalled their reservations on the admissibility of dealing in the draft articles on State responsibility with countermeasures. Concern was expressed that, too often, such measures legitimized power play and coercive measures rather than promoting the equity and justice essential for a new world order. The practice whereby the claimant State acquired the status of a judge in its own cause was viewed as particularly suspect and emphasis was placed on the need for a careful structuring of the restraints in the interests of sovereign equality, territorial integrity, political independence and the regulation of international relations on the basis of international law, equity and justice. The remark was however made that, although the formulations worked out for delicts in articles 11 to 14 were too open, permissive and lax, they were suitable, or almost so, for crimes.

68. With regard to paragraph 2, the concept of "interim measures" gave rise to objections. It was said in particular that the difficulties inherent in that concept, which had been borrowed from Article 41 of the Statute of the Court, had already been considered and rejected twice by the Drafting Committee in the context of delicts.

69. As to paragraph 3, the arguments put forward by the Special Rapporteur in support of the deletion, in the case of "crimes", of the clause "the effects ... on the injured State", as contained in article 13 adopted by the Commission on first reading, 44/ were viewed as unconvincing. It was emphasized that there were precedents which militated in favour of the retention of the clause in the case of delicts, such as the Air Transport Services Agreement case, 45/ and that the lack of precedent in relation to "crimes" - a newly invented concept - in itself indicated a dearth of interest on the part of States.

(iv) Draft article 18 46/

70. General comments on the draft article included (1) the observation that some of its provisions failed to make a distinction between the rights of the State whose individual rights were violated and the rights of other States and (2) and the remark that some of the wording had more to do with the rules on the maintenance of international peace and security than with the law of State responsibility.

71. As regards paragraph 1, it was pointed out that the requirement of a prior decision of the ICJ for the obligations listed to come into effect would have an adverse effect on the effectiveness and promptness of the reaction. The question was further asked why the obligation in subparagraph (a) should be subject to a decision of the ICJ - an observation which was also made in relation to subparagraph (b). Also on subparagraph (a), the remark was made that there did not appear to be any reason to confine nullity or non-recognition to international crimes: nullity seemed to apply to cases in which the internationally wrongful act took the form of legislation even if there was no allegation of criminal conduct and international practice was replete with examples of cases in which non-recognition was called for even though there had been no determination that a given line of conduct, though illegal, was criminal. This remark was viewed as also applicable to subparagraph (b) and, possibly, subparagraph (c). With reference to subparagraph (c) the question was asked whether all States would be under an

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44/ See footnote 7 above.

45/ Reports of International Arbitral Awards, vol. 18, p. 417.

46/ See footnotes 25 and 26 above.

obligation to cooperate in whatever countermeasure was decided by any one State as long as it was not a prohibited countermeasure and even if they deemed the countermeasure inadequate or excessive. This question, it was remarked, was not just an academic one, because all injured States were entitled to address to the wrongdoing State very onerous demands of disarmament, demilitarization, dismantling of war industry, destruction of weapons, acceptance of observation teams, adoption of laws affording adequate protection for minorities and establishment of a form of government not incompatible with fundamental freedoms, civil and political rights and self-determination. As regards subparagraph (e), the reference to the obligation fully to implement the aut dedere aut judicare principle was viewed as out of place. It was further suggested to replace the latter part from the word "individuals" by "individuals whose crimes gave rise to the international responsibility of the State". Subparagraph (f) was viewed as an unnecessary duplication of those provisions of the constituent acts of international organizations which conferred a power of decision on specific organs of the organization. It was at the same time criticized as going much too far in placing on States an obligation to comply with the "recommendations" of international organizations and the wishes of any particular political group.

72. With respect to paragraph 2, the remark was made that demands for fact-finding operations or the sending of observer missions should not be left to the discretion of individual States, but should emanate from the international community.

(v) Draft article 19 47/

a. General observations on the institutional scheme proposed by the Special Rapporteur

73. The Special Rapporteur's institutional scheme, which consisted in a two-phase procedure in which the General Assembly or the Security Council would make a preliminary political assessment and the ICJ a decisive pronouncement on the existence/attribution of an international crime, was viewed by a number of members as having many positive features. Those members, while recognizing that the proposed system was somewhat bold, considered that it would be reasonable to submit it to States with a view to the progressive development of international law and that the Commission would

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47/ See footnote 27 above.

be discredited if, having taken nearly a quarter of a century to elaborate a draft on State responsibility, it did not include an institutional mechanism of the type proposed. According to one view, that mechanism was in fact modest in that it was not designed to apply to crimes alone, and that was already a concession to the sacrosanct sovereignty of States. The Commission, it was stated, should not be overly concerned with realism lest it might become an accomplice of those States which refused to accept the jurisdiction of the competent international organs not only to evade the consequences of their acts, but also to retain complete freedom of action. The members in question considered that intervention by a political organ and then by a judicial organ provided a firm guarantee against arbitrary action. The remark was made in this context that the idea of compulsory third-party involvement had found expression in a number of instruments and was therefore not revolutionary. Also in support of the Special Rapporteur's scheme, it was observed that, although the precondition of an expression of "concern" by the General Assembly or the Security Council and of a finding of "guilt" by a judicial body operated with regard to sanctions which all States could then take on their own authority, that did not affect the powers of the Security Council acting under Chapter VII. Along the same lines, the Special Rapporteur's scheme was viewed as convincing and reasonable inasmuch as (1) it was part of the existing institutional framework; (2) it made the best possible use of the possibilities offered by the United Nations system; (3) it respected the competence of the United Nations bodies that were in a position to intervene; and (4) it was responsive to the need to ensure a rapid reaction to a crime in that (i) it gave States the possibility to apply such urgent interim measures as were required to protect the rights of an injured State or to limit the damage caused by the international crime (draft article 17, paragraph 2); (ii) it provided for an obligation of States to participate in action by an international organization and to facilitate action intended to remedy emergency situations (draft article 18); and (iii) it created no obstacle to the implementation by the injured States of the legal consequences flowing from delicts. The members in question, while aware that the proposed scheme was not without shortcomings and expressing readiness to consider alternative approaches, warned that the Commission could not at this stage expect more than imperfect solutions reflecting the international community's strengths and weaknesses.

74. Some members, on the other hand, drew attention to what they considered as serious flaws in the Special Rapporteur's scheme. A first criticism related to the cumbersome nature of the system which might well paralyse the response to the "heinous wrongful act" and largely divest of their substance draft articles 16 to 18, which, paradoxically, made the response to crimes subject to far stricter conditions than the response to delicts. A second criticism related to the underlying assumption that States would accept the compulsory jurisdiction of the ICJ for crimes under Article 36, paragraph 2, of the Statute of the ICJ. Such an assumption, it was stated, was unrealistic, particularly with regard to articles of so vast a scope as those under consideration, and condemned the proposed system to being no more, at the present stage of development of international society, than an optional system. A third criticism concerned the extent to which the proposed procedures were compatible with the Charter. Detailed views on this point are reflected in paragraph 76 below. A fourth criticism related to the practical effects of the envisaged scheme: the question was asked what incentive the injured State had to trigger a cumbersome procedure which would not end up in a decision on the merits or a solution to the crime and whether it would not be contrary to the maxim ex turpi causa non oritur actio to allow the wrongdoing State to invoke that procedure, thus delaying resort to countermeasures directed against it. A fifth criticism related to the need to develop a complex and perplexing new system to deal with so-called "crimes" if it could be established that wrongful acts categorized as the most serious breaches constituted threats to the peace and could as such be dealt with by a mechanism already in place.

b. The role assigned to the General Assembly, the Security Council and the International Court of Justice under the proposed scheme

The roles of the General Assembly and the Security Council

75. While the view was expressed that it was entirely possible to entrust the General Assembly or the Security Council with tasks which, though not expressly provided for in the Charter, were none the less in conformity with their general role, serious doubts were expressed on the proposed involvement of those two organs in the implementation of the special legal consequences deriving from crimes. While the great political value of the General Assembly's recommendations was acknowledged, the possibility of incorporating them in an institutional procedure was queried. It was also

recalled that there were many cases where the Assembly had passed over glaring violations in silence, mostly for political reasons. The question was furthermore asked whether action by the General Assembly could result in the Court being seized of a case where the wrongdoing State was not a party to the future convention. As for the Security Council, its function was also viewed as purely political. Concern was expressed that the suggestion that the Security Council or the General Assembly should consider whether a "crime" would justify the grave concern of the international community would mean that the Security Council or the General Assembly would become involved in the legal field in that they would be enabled to exercise a de facto judicial function which was incumbent ipso facto on an international judicial body. The question therefore arose whether such a suggestion did not give rise to questions of compatibility with the Charter and it was pointed out that questions of interpretation or review of the Charter fell outside the Commission's mandate. Concern was also expressed about a system which would give the Assembly and the Council powers that were not set out in the Charter, namely, the power to establish the mandatory jurisdiction of the Court with respect to crimes: no comparable powers, it was stated, were conferred on United Nations organs by the Genocide or Apartheid Conventions, which the Special Rapporteur had cited in support of his proposed scheme. Lastly, a note of warning was sounded against overlapping jurisdictions which might entail the risk of slipping from the universe of reparations into that of sanctions.

76. Incompatibilities between the Special Rapporteur's scheme and specific provisions of the Charter were mentioned as follows:

The possibility offered to accusing States to seize the Council and the Assembly at the same time was inconsistent with Article 12 and entailed a risk of conflicts between the two organs which Article 12 was precisely designed to avert - conflicts which, notwithstanding the Special Rapporteur's view to the contrary, could not be settled by the Court, bearing in mind the spirit of the decision taken at San Francisco not to provide for some form of review of actions taken by the political organs of the United Nations;

Under Articles 24 and 39, the role of the Security Council should be confined to determining the existence of any threat to the peace, breach of the peace or act of aggression;

The requirements as to majority laid down in draft article 19, paragraph 2, were not in conformity with Articles 18 and 27 of the Charter: in the case of the General Assembly, it was for that body to determine, under Article 18, the questions for which a two-thirds majority was required. In the case of the Security Council, the concluding clause of draft article 19 reading "provided that any members directly concerned shall abstain from voting" was viewed as incompatible with Article 27, paragraph 3: the remark was made in this connection that a decision according to which a State was subjected to the jurisdiction of the ICJ necessarily fell within the scope of Chapter VII, as did any decision relating to a threat to the peace (the type of situation which the concept of "crimes" was intended to cover), so that the permanent members would, under Article 27, be able to exercise their veto; the question then arose whether a State could bind itself, with regard to future determinations, not to use its veto power. The remark was made in this context that the voting requirements provided for in paragraph 3 of draft article 19 were either consonant with the Charter - in which case they were unnecessary - or inconsistent with the Charter, in which case they were moot, bearing in mind Article 103 of the Charter. It was also said that, even if the veto of a permanent member could be averted under Article 27, paragraph 3, the member's allies among the permanent members could act in its stead.

The role of the International Court of Justice

77. Some members welcomed the role assigned to the Court under the Special Rapporteur's scheme. While they recognized that the judicial phase would probably take time, they suggested various ways of expediting the procedure, such as increasing the number of judges, appointing an ad hoc chamber and making changes to the procedure. The possibility was also mentioned of having recourse to existing international courts either at the regional level (in the human rights field, for example) or within the framework of specific regimes, (in particular, that of the law of the sea).

78. Other members took the view that the Special Rapporteur's scheme placed too much reliance on the Court. The remark was made that it took the Court an average of four years to give its judgment in any given case and that, since no less care or time would have to be given to a matter as serious as an allegation of a crime of State, procedural innovations of the type referred to above were highly unlikely to have any effect on the length of the proceedings - not to mention the fact that some of those innovations might

require an amendment of the Statute. Concern was expressed that States could not reasonably be expected to defer their reaction to a crime for years. The increase in the workload of the Court that might result from the proposed scheme was viewed as compounding the problem.

79. Other comments concerning the role assigned to the ICJ in the proposed scheme included (1) the remark that the Court had no adequate techniques for independent fact-finding - a serious handicap in the conduct of proceedings in which the accused State might not be willing to participate; and (2) the observation that, for the determination of the existence/attribution of a crime, the advisory procedure - provided it ended in a binding opinion following the precedents of article 37, paragraph 2, of the Constitution of the ILO and article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations - might be preferable to contentious proceedings which were complicated and time-consuming and might prejudice the authority of the Court if they stopped short of a final judgment in the case.

80. As regards the institution of proceedings before the Court under paragraph 2 of article 19, the question was asked whether there should be a differentiation between directly affected States and other States. In this context, it was recalled that the ICJ had been reluctant to accept an actio popularis and had ruled as follows in its Judgment of 18 July 1966 in the South West Africa cases 48/ brought by Ethiopia and Liberia: "... the argument amounts to a plea that the Court should allow the equivalent of an 'actio popularis', or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the 'general principles of law' referred to in Article 38, paragraph 1 (c), of its Statute". Concern was furthermore expressed that making the institution of proceedings depend, as proposed by the Special Rapporteur, on a complainant State which would have to shoulder the burden of prosecution was a chancy process and that, furthermore, a complainant State, which would, by definition, be far from unbiased, might not be the right prosecutor.

48/ I.C.J. Reports, 1966.

c. Alternative approaches

81. It was suggested that, as a substitute for the ICJ, an independent commission of jurists of the type found in the practice of the League of Nations, as well as a prosecutor, should be appointed by the political organ registering the initial concern: since the commission would be a subsidiary organ of the United Nations, no problem of compulsory jurisdiction would arise; since it would be convened on a full-time basis, it would be capable of acting rapidly; and since it would have at its side a prosecutor, it would have facilities for fact-finding and be able to conduct its proceedings with impartiality, professionalism and effectiveness. This suggestion was supported by some members, but gave rise to reservations on the part of others. Concern was expressed that a juridical body appointed directly by a political organ on a case-by-case basis might not be perceived as conducive to due process, so that political objections to the involvement of the General Assembly or the Security Council would not be overcome. The proliferation of dispute settlement procedures was also mentioned as a factor to be borne in mind. The remark was further made that problems relating to the compulsory jurisdiction of the Court and to fact-finding could be taken care of if the political organs empowered the Court accordingly.

82. The Special Rapporteur, bearing in mind the reservations expressed on the scheme he had proposed, suggested another arrangement as follows: the General Assembly or the Security Council could appoint an ad hoc prosecuting body which would have the function of investigation/fact-finding and would expedite the proceedings; the President of the ICJ could appoint an ad hoc chamber of five judges who would be assigned to the case once the Court had been seized following the determination by the political body. Such an approach should, in the view of the Special Rapporteur, allay the concern of those who feared excessive delays, particularly if they bore in mind the possibility open to injured States, under article 17, paragraph 2, to resort to emergency measures and their right to implement, without waiting for compliance with the condition laid down in article 19, the legal consequences applicable to delicts under articles 6 to 14.

83. A number of other variants were proposed. Under one arrangement, the General Assembly, acting at the request of a State or proprio motu, would determine that a crime had been committed and adopt an appropriate resolution, which, although being merely recommendatory, would legitimize further action

of States; the Security Council could, of course, adopt emergency measures under Chapter VI or VII of the Charter and it would be open to the States concerned to ask the General Assembly to request from the Court an advisory opinion, which, as was already the case in disputes between organizations, would be legally binding. A further proposal was to leave any instances where the maintenance of international peace and security was at stake to the Security Council and to envisage for other situations a simpler system whereby any State intending to take action against an alleged wrongdoer would have to notify its intention to the States parties to the future convention, which could enjoin the State concerned to desist from its plans, after which the said State could bring the matter before the ICJ. Other proposals sought (1) to replace judicial settlement by arbitration; (2) to give jurisdiction in matters of State responsibility to the international criminal court on which work was proceeding apace; or (3) to establish a new court to which aggrieved States could have direct access for the purpose of determining whether an international crime had been committed by a State.

84. Under a different approach, the mechanism proposed by the Special Rapporteur should be used a posteriori, in a simplified and lightened form, to justify or condemn the response to a crime, so that States could have the right, without prior determination of the existence of a crime, to implement the consequences flowing from any delict and the consequences specific to the crime. Accordingly, (1) draft article 19 would be dropped and an appropriate provision on dispute settlement 49/ would be included in Part Three; (2) the objections based on the slowness of the judicial procedure would lose some of their force; and (3) the system of prior political filtering would serve no further purpose. The "world prosecutor" mentioned during the discussions referred to in paragraph 81 above could be a useful auxiliary in that a posteriori procedure. The author of the proposal explained that the situation would be analogous to that provided for in article 66 of the Vienna Convention on the Law of Treaties in that any State party could seize the Court, the position of the applicant State being occupied either by the State

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49/ which might read:

"Any one of the parties to a dispute concerning the application or the interpretation of articles 16 to 18 of Part Two may, by a written application, submit the dispute to the ICJ for a decision unless the parties by common assent agree to submit the dispute to arbitration."

which reacted to the crime or by the State which objected to the reaction, and the position of the defendant State, by the other State(s), which could, of course, be very numerous, even though, in the case of a massive reaction by the international community, the defendant State would probably not dare to bring the matter before the Court.

85. This approach was viewed by some members as opening up interesting prospects. Concern was, however, expressed by other members that it would allow States too much freedom to take the law into their own hands in an extremely sensitive area and might lead to international anarchy. It was also stressed that, in the event of intervention by the Court a posteriori, it was the State held to be criminal, perhaps wrongly so, that would bear the cost of procedural delays.

86. As indicated in paragraph 74 in fine above, there was also a view that the construction proposed in draft article 19 served no useful purpose if - as was likely to be the case in the light of the experience of the Security Council - the acts which the international community might plausibly consider to be crimes of States represented more often than not threats to international peace and security. Peripheral cases, it was added, could be dealt with as erga omnes violations, combined with some refinements of the concepts relating to directly or indirectly injured States.

d. Other comments on article 19

87. As regards paragraph 4, the question was asked why the option to join the proceedings of the Court was open only to States Members of the United Nations. The doubt was also expressed that that paragraph might open up possibilities of involvement other than those covered by Articles 62 and 63 of the Statute of the Court and it was suggested that the nature of the jurisdictional link created by General Assembly or Security Council action should be examined closely to determine whether such a link solved all locus standi issues.

88. Paragraph 5 was viewed as unsatisfactory because, although an institution of the international community was involved, it provided only for a bilateral procedure.

(4) The draft article proposed by the Special Rapporteur for inclusion in Part Three of the draft 50/

89. The few members who commented on this draft article (numbered 7 by the Special Rapporteur) noted that providing in the case of crimes for binding third party dispute settlement might offer a way around the difficulties inherent in the requirement of a prior determination by a political body and subsequent involvement of a judicial organ, as envisaged in draft article 19. They therefore endorsed the spirit of draft article 7. It was, however, suggested that the provision should be modelled on article 66 of the 1969 Convention on the Law of Treaties.

(d) The courses of action open to the Commission

90. As for the action to be taken on the seventh report, a number of members advocated the referral to the Drafting Committee of the draft articles proposed by the Special Rapporteur for inclusion in Part Two of the draft articles. In this context, the view was expressed that, if article 19 of Part Two proved too controversial, it could be abandoned and draft article 7 of Part Three strengthened and that, when draft articles 15 to 19 were considered, the Drafting Committee could review articles 11 to 13 and perhaps articles 6 to 10 to ensure the necessary consistency throughout the provisions on the consequences of internationally wrongful acts. It was pointed out, in support of referral of the Special Rapporteur's proposals to the Drafting Committee, that, 20 years earlier, the Commission had adopted Part One of the draft, including article 19, in a move which, in the words of one member, still represented the single most daring act of progressive development in its history and that the time had now come to draw the consequences of that decision. The difficulties encountered in fleshing out the concept of crime

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50/ This article reads as follows:

"1. Any dispute which may arise between any States with respect to the legal consequences of a crime under articles 6 to 19 of Part Two shall be settled by arbitration on either party's proposal.

2. Failing referral of the dispute to an arbitral tribunal within four months from either party's proposal, the dispute shall be referred unilaterally, by either party, to the International Court of Justice.

3. The competence of the Court shall extend to any issues of fact or law under the present articles other than the question of existence and attribution previously decided under article 19 of Part Two."

were, it was stated, no reason for abandoning the current endeavour, particularly as the deletion of article 19 would not solve the problem of differentiating between ordinary delicts and serious breaches of international obligations. Emphasis was also placed on the need to promote the progressive development of international law. In this connection, regret was expressed that the debate on the crucial topic of State responsibility had given rise, at a time when the United Nations was celebrating its fiftieth anniversary, to heated controversy which gave the impression that respect for international law was not as urgent a priority today as it had been in the aftermath of the Second World War. It was also emphasized that the formulation by the Drafting Committee, either at the present session or at the next session, of articles based on the Special Rapporteur's proposals would certainly not prevent the Commission from achieving the objective it had set itself, namely, to complete the first reading of the draft on State responsibility in 1996. Some of the members who were in favour of referring the draft articles to the Drafting Committee stressed that the Commission should allow Governments sufficient leeway and, in that connection, could submit to them not one single proposal, but alternatives or separate proposals.

91. Other members took the view that the work under way was based on vague notions which were a source of controversy and urged the Commission, before committing itself further, to ensure that those notions were endorsed by the international community. The progressive development of the law, it was said, did not call for revolutionary solutions, even if they were generous solutions, but required, on the contrary, a keen sense of reality. The opinion was also expressed that the issues which the Special Rapporteur attempted to solve could be - and were being - addressed in the context of threats to peace and security and that there was therefore no world order imperative that called for a study of the problems raised by the difficult and controversial question of crimes. Concern was expressed that the approach contemplated whereby the regime of international responsibility would be made into a regime that would be the counterpart of or complement to that under the Charter seemed to be too ambitious to meet with the acceptance of States and would have a chance of succeeding only in a world of greater political and economic integration, one where the participants were respected for their power not of coercion, but of persuasion, and where the national interest was in communion with the common interest. In view of the above, the members in

question expressed the fear that further work on crimes would delay the completion of the first reading of the draft and supported the idea, put forward in the Sixth Committee at the last session of the General Assembly, that consideration of the question of the legal consequences of crimes should be deferred until the second reading.

3. Summing up of the debate by the Special Rapporteur

92. Referring to differences of opinion on the concept of State crime, the Special Rapporteur suggested that the problem of terminology should be left aside for the time being, stressed that his proposals did not take account of the punitive element and emphasized that a distinction had to be made between crimes within the meaning of article 19 of Part One of the draft and crimes against the peace and security of mankind, notwithstanding the fact that the punishment of the persons responsible was one of the sanctions to which a wrongdoing State could be liable.

93. With regard to the risk of a negative reaction by States to his proposals, the Special Rapporteur said that the Commission, which was composed of independent experts, did not have to anticipate the possible objections of States, but must contribute to the progressive development of international law by striking a fair balance between the ideal and what was possible. It might therefore propose several alternatives for the regime of State crimes.

94. He considered that there appeared to be a fairly wide measure of agreement on draft articles 15 to 18, although differences of opinion had been expressed on the question of territorial integrity (see para. 60 above) and some concepts, such as the vital needs of the population, "exemplary" damages and compensation in the event of a crime, had been regarded as requiring further study.

95. With regard to the concept of injured State, the Special Rapporteur referred to three hypotheses. The first was that a crime caused roughly the same harm to all States (the crime being, for example, a serious alteration of the ozone layer). In that case, all States would be entitled to demand cessation, restitution in kind and guarantees of non-repetition, the only difference being the amount of compensation. That hypothesis might be covered by combining draft article 15 (see footnote 15 above) and article 8 of Part Two (see footnote 7 above). The second hypothesis was that a crime did not affect any State in material terms (the crime being, for example, a violation by a State of the human rights of its nationals). In such a case,

all States would have grounds for demanding cessation, restitution in kind for the benefit of the persons harmed, satisfaction and guarantees of non-repetition and for taking the necessary interim measures, but none could demand compensation. There again, it was not necessary to establish a special regime for crimes. The third hypothesis was that the crime (aggression, for example) affected the entire international community, but harmed one or more specific States in particular: they obviously had the right to demand more than the other injured States by way of restitution in kind, reparation and even satisfaction and guarantees of non-repetition in view of the greater amount of material or moral injury they had suffered, but no particular adaptation of the special or supplementary consequences referred to in draft articles 15 to 18 would be necessary. Similar considerations should hold true in the case where some States, more than others, were affected by a massive violation of human rights or a violation of the right to self-determination because of their geographical location or ties between their population and the victim population.

96. With regard to countermeasures, paragraph 2 of draft article 17 on urgent interim measures (see footnote 20 above) was, of course, not intended to apply to all injured States in the same way: those States were all entitled immediately to take the necessary measures to obtain cessation and avoid irreparable damage, but only the most directly concerned were entitled to take urgent interim measures in order, for example, to protect their territorial integrity or their political independence, account duly being taken of the principle of proportionality.

97. As to draft article 18 (see para. 71 above), the Special Rapporteur explained that paragraph 1 (c) and (g), which provided for a certain amount of cooperation and consultations between injured States, had been based on the concern to achieve the desired objective while avoiding any excessive institutionalization that might make his proposals less acceptable.

98. As far as institutional machinery was concerned, the Special Rapporteur noted that, according to the prevailing viewpoint, the decision on the existence and attribution of a crime had to be taken by the International Court of Justice, but that approach had nevertheless given rise to objections relating, inter alia, to the fact that States were unlikely to accept the general compulsory jurisdiction of the Court. In this connection, the Special Rapporteur reiterated the views stated in paragraph 14 above and pointed out

that, if the conventions on genocide, racial discrimination, apartheid, discrimination against women and torture were anything to go by, States were perhaps less reluctant than it might appear to accept the compulsory jurisdiction of the Court in particular areas such as that of crimes. In his view, the idea of setting up an ad hoc commission which would act as prosecutor or prosecuting body was interesting, but he stressed that a commission of jurists appointed on an ad hoc basis by a political body (see para. 81 above) would not offer the best guarantees of objectivity, continuity and consistency in the interpretation and enforcement of the law and might thus be less acceptable to States than applying to the International Court of Justice. He also referred to the proposal reflected in paragraph 84 above, but stressed that it was dangerous to rely on the unilateral evaluation of States and that, if verification took place a posteriori, it would be the State held to be criminal, perhaps wrongly so, that would bear the cost of procedural delays. Such delays, whose disadvantages must, moreover, not be overestimated in view of the possibility that States might resort to the urgent interim measures dealt with in paragraph 2 of draft article 17 (see footnote 20 above) and might, in any event, claim the rights resulting from the commission of a delict, could be avoided through, for example, the appointment of an ad hoc chamber of the International Court of Justice.

99. As to the compatibility of the proposed regime with the United Nations Charter, the Special Rapporteur stressed that there was no question of vesting the General Assembly or the Security Council with power to make a binding decision concerning the jurisdiction of the Court. That jurisdiction would derive from the convention itself, not from a resolution of the Assembly or the Council, which would only trigger the pre-existing jurisdictional link established between the States parties by the future convention through a compromissory clause.

100. Referring to the requirements for the adoption of the resolution in question (see para. 76 above), the Special Rapporteur said that the Assembly and the Council would still be in control of the implementation of Articles 18 and 27 of the Charter. The rules laid down in paragraph 3 of draft article 19 (see footnote 27 above) would come into play only for the purpose of the implementation of the future convention and the institution of the proceedings for which it provided. The paragraph in question was therefore not

constitutionally incompatible with the Charter and the Drafting Committee might, if necessary, ensure that any possible ambiguity was removed.

101. With regard to the view that, because of the universalization of the status of injured State, the future convention would function for the entire community of nations and not just for the States parties, the Special Rapporteur pointed out that the problem also arose for the breach of any other erga omnes obligation. He also said that the right of all States to take countermeasures was governed by principles of general international law which the future convention would simply codify and clarify. As to the fear that the proposed solution would open the way to some form of actio popularis (see para. 80 above), the Special Rapporteur considered that the requirement of the adoption of a previous resolution by a political body would keep that possibility under reasonable control. In any case, the Court's negative 1966 decision should not, in his opinion, be viewed as a felicitous precedent.

102. Referring to the criticism that the group of States which would become parties to the future convention might not be the same as the group of States in the Assembly or the Council (see para. 46 above), the Special Rapporteur recognized that it was justified, but that its importance should not be overestimated, since (1) any accused State would be entitled to refer the matter unilaterally to the International Court of Justice; (2) "screening" by the Assembly would prevent abuses; and (3) the possible alternatives had even more disadvantages. He also pointed out that similar problems would arise in the case of any convention on the codification and development of international law. The solution of the adoption by the General Assembly of a separate instrument (see para. 46 above) was not viable because the Assembly had no power to adopt binding rules.

103. In connection with objections relating to Article 12 of the Charter (see para. 76 (i) above), the Special Rapporteur recalled that that Article had frequently been ignored or circumvented by the General Assembly and that many persons wondered whether it had not become obsolete. Where a matter was before the General Assembly and the Security Council at the same time, Article 12, even taken literally, would simply preclude the Assembly from taking a decision, but would not prevent the Council from adopting the prior resolution provided for by paragraph 2 of draft article 19 (see footnote 27 above). Any failure by the two bodies to act would mean either that the alleged facts were not recognized by the international community they were

supposed to represent as being sufficiently serious or that the international community considered it advisable to regard the matter as involving the maintenance of international peace and security rather than State responsibility.

104. Some members expressed the view that, since international crimes would usually involve a threat to peace, for the maintenance of which the Security Council was responsible, the Commission should confine itself to a "renvoi", to the system of collective security. They considered that their view was confirmed by the current tendency in the Council to broaden the concept of "threat to peace" and based themselves on article 4 of Part One (see footnote 32 above). The Special Rapporteur recognized that it was not the Commission's task to make binding interpretations of the Charter, but it could not give the General Assembly technical assistance for the progressive development and codification of international law if it backed away from every problem involving the interpretation of the Charter. In his view, the subject-matter of paragraphs 1 and 2 of draft article 19 involved the peaceful settlement of disputes, as dealt with in Chapter VI of the Charter, and it would be inaccurate to say that, where a crime might endanger international peace and security (or where it came under Article 39), it should be left exclusively to the Security Council. The identification of the rights and obligations violated, the attribution of the violation and the determination of the consequences were governed by the law of State responsibility. In the Special Rapporteur's opinion, the establishment of a regime of international crimes and an institutional mechanism to implement it would not prejudice the constitutional functions of the Security Council and his draft article 20 (see footnote 24 above) offered every guarantee in that regard. The Special Rapporteur nevertheless maintained that, despite the problematic wording of article 4 of Part Two, which tended to set aside the law of responsibility and replace it with the discretionary powers of the Security Council whenever the maintenance of peace was at stake, it was for the law of responsibility to say whether the alleged facts were an internationally wrongful act, whether that act could be characterized as a crime, what the consequences were and what mechanisms or procedures had to be used to settle disputes arising from the implementation of those consequences. The Special Rapporteur also noted that, even if article 19 of Part One disappeared and the concept of threat to peace

took the lead from the concept of crime, it would still be necessary to guarantee the integrity and effectiveness of the law of State responsibility, which was part of a general international law that no United Nations body - and especially not the Commission - could ignore or set aside.

105. In view of the foregoing, the Special Rapporteur recommended that the draft articles contained in his seventh report should be referred to the Drafting Committee together with the other proposals which had been made during the debate.

4. Action by the Commission under the topic

106. The Special Rapporteur's recommendation as reflected in paragraph 105 above gave rise to objections on the part of those members who considered article 19 of Part One as fundamentally flawed and found it illogical and counter-productive to assign to the Drafting Committee a mandate predicated on the acceptance of the highly controversial and deeply flawed concept of "State crime", which had no basis in State practice and violated the principle that a society or people cannot be found delinquent. It was noted in this connection that individuals, not States, committed crimes. It was furthermore argued that the Commission was missing an opportunity to examine jointly the issues raised by the concept of crime and the consequences to be drawn therefrom. Concern was furthermore voiced that the Special Rapporteur's scheme was unrealistic, unduly complex and difficult to implement and raised questions concerning the Charter of the United Nations.

107. The contrary view was, however, that the objections referred to in paragraph 106 above were unconvincing for the following reasons: article 19 of Part One had been adopted unopposed on first reading and submitted for comments, together with the rest of Part One, to Governments, some of which had approved of its content; the task of the Commission and of the Drafting Committee was therefore, at the present stage, to study the consequences, if any of the notion of State crime and to report to the General Assembly on the results of its study; only at the stage of the second reading should the Commission, in accordance with well established practice, review the articles adopted on first reading - including article 19 of Part One in the light of the results of the work carried out on the consequences of internationally wrongful acts and on the basis of the observations of Governments; asking the Drafting Committee to consider proposals based on the deletion of article 19 of Part One or on the elimination of the concept of crime would be tantamount

to giving the Committee a blank cheque since no specific proposal had so far been made in plenary along those lines; and it would be an impossible task for the Drafting Committee to seek solutions to a problem the very existence of which would be continuously challenged through the calling in question of article 19 of Part One.

108. At its 2406th meeting, on 28 June 1995, the Commission decided, by 18 votes to 6, with no abstention, to refer the draft articles proposed by the Special Rapporteur in his seventh report (A/CN.4/469/Add.1 and 2) to the Drafting Committee for consideration in the light of the various proposals made and the views expressed on the subject.

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STATE RESPONSIBILITY

Titles and texts of draft articles on State Responsibility adopted by the Drafting Committee at the forty-seventh session

State Responsibility

Part Three

SETTLEMENT OF DISPUTES

Article 1

Negotiation

If a dispute regarding the interpretation or application of the present draft articles arises between two or more States Parties to the present draft articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Article 2

Good offices and mediation

Any other State Party to the present draft articles, not being a party to the dispute, may, upon its own initiative or at the request of any party to the dispute, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

GE.95-62688 (E)

Article 3

Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in the Annex to the present draft articles.

Article 4

Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Article 5

Arbitration

1. Failing the establishment of the Conciliation Commission provided for in article 3 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present draft articles.

2. In cases, however, where the dispute arises between States Parties to the present draft articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present draft articles.

Article 6

Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present draft articles, shall operate under the rules laid down or referred to in the Annex to the present draft articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Article 7

Judicial settlement

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the award the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. The issues in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration in conformity with article 6.

Annex

Article 1

The Conciliation Commission

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present draft articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 3 of Part Three by a request to the Secretary-General who shall establish a Conciliation Commission to be constituted as follows:

(a) The State or States constituting one of the parties to the dispute shall appoint:

(i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(b) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The 4 conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(d) The 4 conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this Annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

Article 2

The Arbitral Tribunal

1. The Arbitral Tribunal referred to in article 5 of Part Three shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of, a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.